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SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 121

BLACK DIAMOND STEAMSHIP CORP.,
PETITIONER,

vs.

ROBERT STEWART & SONS, LTD., ET AL.

No. 130

THE UNITED STATES OF AMERICA, PETITIONER,

vs.

ROBERT STEWART & SONS, LTD., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONS FOR CERTIORARI FILED {JUNE 25, 1948.
JUNE 28, 1948.

CERTIORARI GRANTED OCTOBER 11, 1948.

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Record from D. C. U. S., Eastern District of New York		1	1
Docket entries		1	1
Petition for limitation of liability		2	1
Bond		14	10
Exceptions to petition		17	12
Notice of motion on hearing on exceptions		19	13
Order dismissing petition		20	14
Findings of fact and conclusions of law		22	16
Notice of appeal and order allowing appeal		28	20
Assignments of error		30	20
Stipulation as to record		34	23
Clerk's certificate	(omitted in printing)	35	
Proceedings in U. S. C. C. A., Second Circuit		36	25
Opinion, Hand, J.		36	25
Judgment		40	28
Clerk's certificate	(omitted in printing)	42	
Orders allowing certiorari		43	29

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCT. 15, 1948.

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[fol. 1]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

A-18610

In the Matter of the Petition of the UNITED STATES OF AMERICA, as Owner, and BLACK DIAMOND STEAMSHIP CORP., as Bareboat Charterer, of the Steamship NORWALK VICTORY, for Exoneration From or Limitation of Liability

DOCKET ENTRIES

1947

Oct. 28. Petition and stipulation for Petitioner's costs filed.

Oct. 29. Bond filed by Black Diamond Steamship Corp.

Nov. 5. Exceptions to petition filed.

Nov. 6. Filed notice of hearing on exceptions.

Nov. 10. By Inch, *J.*: Order filed. Exceptions of the damage claimants sustained. The petition for limitation of or exoneration from liability dismissed.

Dec. 22. By Inch, *J.*: Findings of Fact and Conclusions of Law filed.

1948

Jan. 5. Notice of Appeal filed.

Jan. 5. Assignments of Error filed.

Jan. 6. Bond on appeal filed.

[fol. 2] IN UNITED STATES DISTRICT COURT

PETITION FOR LIMITATION OF LIABILITY

To the Honorable the Judges of the United States District Court for the Eastern District of New York:

The Petition of the United States of America, as owner, and Black Diamond Steamship Corp., as bareboat charterer, of the Steamship Norwalk Victory, in a cause of Limitation of and Exoneration from Liability, civil and maritime, alleges as follows:

First: At all the times hereinafter mentioned the petitioner, United States of America, was and now is a Corpo-

ration Sovereign and the owner of the steamship Norwalk Victory.

Second: At all the times hereinafter mentioned the petitioner, Black Diamond Steamship Corp., was and now is a corporation organized and existing under the laws of the State of Maryland, with an office and place of business at No. 39 Broadway, Borough of Manhattan, New York City, N. Y., and was and is the bareboat charterer of the steamship Norwalk Victory.

Third: The Norwalk Victory is a steel screw steamer of 7,606 tons gross and 4549 tons net register, about 455 feet long, 62 feet beam and 38 feet depth, and was built in Portland, Oregon, in 1945.

Fourth: The petitioners used due diligence to make the steamer Norwalk Victory seaworthy before the commencement of the voyage involved herein, and she was, prior to the collision hereafter mentioned, tight, staunch and strong, and properly and efficiently officered, manned, equipped and supplied, and was in all respects seaworthy and fit for the service in which she was engaged.

[fol. 3] Fifth: On April 28, 1947, the Norwalk Victory was completing a voyage from New York to Antwerp, Belgium and Rotterdam, The Netherlands, having put into Antwerp as the first port of call.

She left her pier at Antwerp, bound for Rotterdam, at 7:50 P. M., European Central Time, having on board about 1150 tons of cargo. Her port and starboard side lights and her masthead, stern and range lights were lit and burning brightly. The night was clear, with the stars shining brightly and the moon in the first quarter. The tide was ebb, the tidal current in the river Schelde being approximately three knots, and the wind was westerly, about force two.

The junior third mate was on watch on the lower bridge, an able seaman was at the wheel, and another able seaman was stationed on the forecastle head as lookout. The master was in the pilot house and on the bridge at all times prior to the collision and there was also a docking pilot on the bridge who had charge of the ship's navigation down to the lock called Kruisschans Sluice, which was about 3½ miles from the basin in which the vessel had been lying.

The Norwalk Victory anchored outside the lock at 9:05 P. M. and remained at anchor until 10:22 P. M. waiting for another vessel to pass through the lock. She entered the lock at 10:54 P. M., at which time a Schelde River pilot boarded her and from then on was in charge of her navigation. She left the lock at 11:26 P. M. going out between two lines of piles, and then entering the river proper, which takes a sharp bend at that point.

From there the channel follows the easterly side of the river down to occulting red buoy 52, but on approaching buoy 52 the channel runs on the westerly side of the river. [fol. 4] About a mile below buoy 52 and closer to the westerly bank of the river there was a sunken wreck of a steamer indicated by a green wreck buoy, and the Norwalk Victory was required to navigate to the westward of that buoy, below which the river takes another bend.

The Norwalk Victory passed to the westward of buoy 52 and it was then necessary to put her rudder to the left and later to the right in order to pass around the green wreck buoy on its westward side. The ship's rudder was put left at 11:40 P. M., her engines being slow ahead. At about that time a vessel, which later proved to be the British steamer Merganser, was observed coming up the river below the bend, showing her masthead and range lights and her red side light. The river pilot of the Norwalk Victory ordered her rudder right in order to round the wreck buoy, and blew to the other vessel a signal of one blast which was not answered. It at once became apparent that the Norwalk Victory was not responding to the right rudder order, whereupon the pilot ordered the rudder hard right but the vessel still did not respond. The pilot then ordered the engines full ahead momentarily in an effort to bring the ship around, but without success. Immediately afterward the pilot ordered the engines full astern and blew a signal of three blasts, followed very shortly by a second signal of three blasts, to which the Merganser responded with three blasts. Following the Norwalk Victory's second three-blast signal, an order was given to stand by both anchors, but there was not sufficient time to drop them.

A collision occurred at 11:45 P. M., in the vicinity of Lillo, Belgium, the Norwalk Victory striking the Merganser amidships on her port side. The Norwalk Victory, following the collision, backed aground on the left bank of the river. The Merganser began to sink and soon was partially

[fol. 5] submerged, with her forward end resting on the river bottom. She remained in that position until the next morning, when she settled to the bottom of the river, showing only her superstructure, masts and funnel. The petitioners are informed that the chief steward of the Merganser, a man named Turner, his given name being unknown to the petitioners, was killed in the collision.

Shortly after the collision, when the after end of the Norwalk Victory was fast aground in the mud, her port steering engine, which was the one being used prior to the collision, was examined and the rudder was found jammed to the left. When the vessel was refloated the next morning a further inspection revealed that the rudder would not come center with the port engine. After a general survey the vessel proceeded on to Rotterdam using her starboard steering engine. On the way to Rotterdam the bonnets of the valves on the port steering engine were removed and a piece of marline about four inches long, which was rolled up into the form of a ball, was found lodged beneath a check valve on the inlet and outlet of the port pump. This small piece of marline prevented the check valve from closing, with the result that the oil pressure which should have moved the ram of the steering gear was returned to the pump, rendering the port steering gear inoperative. The system was a closed one, there being no way of inducing any such matter into it after it was closed, as it was at or before the time the construction of the ship was completed and she was placed in operation. This piece of marline therefore was somewhere in the system from the time the vessel was built, in 1945, no one being aware of or suspecting its existence because of the uniformly excellent performance of the steering gear.

[fol. 6] Sixth: Those in charge of the Norwalk Victory were careful at all times in the performance of their duties and navigated the Norwalk Victory prudently and skillfully. The aforesaid collision and the loss, damage and destruction resulting therefrom were not caused or contributed to by any fault, negligence or want of care on the part of the Norwalk Victory, or those in charge of her, or the petitioners herein, or by anyone for whom the petitioners may be responsible, and were occasioned and occurred without the privity or knowledge of the petitioners, and so far as the petitioners and the Norwalk Victory were concerned were an inevitable accident.

The said collision and consequent loss, damage and destruction were, on the other hand, caused solely by the negligence of the steamship Merganser and those in charge of her in the following respects, among others which will be pointed out upon the trial:

1. She was not in charge of competent persons.

2. She failed to keep a proper lookout.

3. The persons in charge of her were not attentive to their duties.

4. She violated Article 40 of the Navigation Rules for the Belgian section of the Schelde River providing that where vessels are meeting at a bend in the river the vessel proceeding against the tide shall hold back until the vessel proceeding with the tide is safely past the bend.

5. She was proceeding at an excessive rate of speed under existing conditions.

6. She failed to answer the Norwalk Victory's one-blast signal.

7. She failed seasonably to stop and reverse her engines.

[fol. 7] 8. She failed to take any steps to avoid the collision after she knew of the presence of the Norwalk Victory.

Seventh. A suit has been brought in this Court against the petitioners and the steamship Norwalk Victory by the British Government and the individuals or concerns below listed, claiming to be owners of cargo on the Merganser, which cargo, it is alleged, was lost as a result of the collision, namely: Robert Stewart & Sons, Ltd., Kessler & Co., Ltd., Van de Wouwer Freres, Potash Ltd., Captain A. R. Cook, Odon Warland, G. Drugmand & Ch. Meert, Armand Gavage, Vereinigts Schumaschinen Aktiengasselschaft, Romeo Canovai & Figli, A/G der Voslauer Kammgarnfabrik, Thomas Frederick & Co., Ltd., S. R. Carrington & Sons, Ltd.. Cupal Ltd., Edwin Butterworth & Co., Ltd., Gandy Ltd., Failsworth Hats, Ltd., Jas. Williamson & Son, Ltd., Leon Lapage & Co. and His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland.

The damages claimed in the said suit aggregate One Million ($1,000,000.) Dollars. The proctors for the libel-

lants are Messrs. Dow & Symmers of 70 Pine Street, New York City, N. Y.

In addition, a suit has been brought against the petitioner, Black Diamond Steamship Corp., by the owner of the Merganser, British and Continental S. S. Co. Ltd., in the High Court of Justice of England, Probate, Divorce and Admiralty Division, for the loss of said vessel. In that suit the petitioner, Black Diamond Steamship Corp., has posted bail in pounds sterling, which, at the current rate of exchange, is equivalent to One Million ($1,000,000.) Dollars.

Also, a suit no doubt will be brought against the petitioners, or one of them, by the personal representatives of the said decedent, Turner.

[fol. 8] There is also a possibility of a suit against the petitioners by the Belgian Government for damages to the bank of the River Schelde, claimed to have been caused by the collision, and for the cost of removing the wreck of the Merganser from the river.

There also may be additional suits against the petitioners by other owners of cargo on the Merganser.

Eighth. There are no demands against the petitioners, and no demands, unsatisfied liens or claims of liens against the steamship Norwalk Victory arising out of the said collision, or any suits pending thereon, so far as is known to the petitioners, except as above set forth.

Ninth. No written notice of claim was given to the petitioners or either of them by anyone at any time more than six months prior to the filing of this petition.

Tenth. The aforesaid collision having occurred within the territorial waters of Belgium, the law of Belgium with respect to the limitation of liability of ship-owners is the law applicable to this case.

Eleventh. The Belgian law as to limitation of liability is the International Convention for the Unification of Certain Rules of Law Relating to the Limitation of the Liability of Owners of Seagoing Vessels, which was signed at Brussels on August 25, 1924, and ratified by Belgium on June 2, 1930. The convention first took effect on June 2, 1931.

Twelfth. The parts of the Convention which are pertinent to this case are as follows:

"Article 1. The liability of the owner of a seagoing vessel is limited to an amount equal to the value of [fol. 9] the vessel, the freight, and the accessories of the vessel, in respect of—

(1) Compensation due to third parties by reason of damage caused, whether on land or on water, by the acts or faults of the master, crew, pilot, or any other person in the service of the vessel;

. . . . . .

(5) Any obligation to raise the wreck of a sunken vessel, and any obligations connected therewith;

. . . . . .

Provided that, as regards the cases mentioned in Nos. (1), (2), (3), (4) and (5), the liability referred to in the preceding provisions shall not exceed an aggregate sum equal to £8 per ton of the vessel's tonnage.

. . . . . .

Article 4. The freight referred to in Article 1 (including passage money), is deemed, as respects vessels of every description, to be a lump sum fixed at all events at ten per cent. of the value of the vessel at the commencement of the voyage.

. . . . . .

Article 7. Where death or personal injury is caused by the acts or faults of the captain, crew, pilot or any other person in the service of the vessel, the owner of the vessel is liable to the victims or their representatives in an amount exceeding the limit of liability provided for in the preceding Articles up to £8 per ton of the vessel's tonnage.

. . . . . .

Article 10. Where a person who operates the vessel without owning it or the principal charterer is liable under one of the heads enumerated in Article 1 or

[fol. 10] Article 7, the provisions of this Convention are applicable to him.

Article 11. For the purposes of the provisions of the present Convention, 'tonnage' is calculated as follows:

In the case of steamers and other mechanically-propelled vessels, net tonnage, with the addition of the amount deducted from the gross tonnage on account of engine-room space for the purpose of ascertaining the net tonnage; * * *"

Thirteenth. The net tonnage of the Norwalk Victory is 4,549 tons and the amount deducted from her gross tonnage on account of engine room space to ascertain net tonnage is 2434.05 tons, making a total of 6,983.05 tons for the purposes of the provisions of the said Convention. The value of the Norwalk Victory at the commencement of the voyage was One Million ($1,000,000.) Dollars.

The amount to which the petitioners' liability, if any, is limited, under the said Brussels Convention, apart from the death of the decedent Turner, is therefore $325,028.79, which sum is arrived at by multiplying the said 6,983.05 tons by eight, making 55,864.40 pounds, and converting this sum into dollars at the rate of exchange of $4.02-13/16ths as of April 28, 1947, giving $225,028.79, and adding thereto $100,000., being 10% of the vessel's sound value at the commencement of the voyage.

Fourteenth. The petitioners claim exemption from liability for the losses, damages, injuries and destruction resulting from the aforesaid collision and for the claims for damages that have been made or hereafter may be made in connection therewith, and allege that they have valid defenses thereto.

[fol. 11] The petitioners further claim the benefit of the limitation of liability provided in the aforesaid Brussels Convention.

The petitioner, United States of America, being a Corporation Sovereign, asks that no bond be required of it.

The petitioner, Black Diamond Steamship Corp., submits herewith its stipulation, with sufficient surety, for the payment, into Court of the sum of Three Hundred and Twenty-five Thousand Twenty-eight and 79/100ths ($325,028.79) Dollars, the amount of the petitioners' liability as

limited by the aforesaid Brussels Convention, whenever the payment of such sum shall be ordered by this Court.

With respect to the decedent Turner, the petitioners ask leave to apply to the Court for an order directing the filing of an additional stipulation sufficient to cover the amount of a probable recovery for his death, if liability therefor is found to exist, when information is received from which to determine the fair amount of such stipulation.

Fifteenth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, the petitioners pray:

1. That the Court rule that the amount to which the petitioners' liability herein, if any, is limited, is governed by the law of Belgium, and specifically the International Convention for the Unification of Certain Rules of Law Relating to the Limitation of the Liability of Owners of Seagoing Vessels.

2. That the Court approve the stipulation submitted herewith by the petitioner, Black Diamond Steamship Corp., [fol. 12] for the payment of the said sum of $325,028.79 into Court whenever the Court shall so direct.

3. That the Court make an order directing the issuance of a monition to all persons claiming or who may claim damages for any and all loss, damage, injury or destruction resulting from the aforesaid collision, citing them in said order to file their claims with the Clerk of the Court, and to make due proof of their respective claims and also to appear and answer the allegations of this petition according to law and the practice of this Court at or before a time certain to be fixed by said monition.

4. That the Court issue its injunction restraining the prosecution of any and all suits, actions and proceedings that may have been already begun to recover damages arising out of, occasioned by, or consequent upon the collision between the steamships Norwalk Victory and Merganser, set forth in this petition, and the commencement or prosecution hereafter of any suit, action or legal proceeding of any nature against the Norwalk Victory and/or the petitioners, except in the present proceeding, in respect of any claim or claims arising out of the said collision.

5. That the Court in this proceeding adjudge that the petitioners are not liable to any extent for any loss, damage, injury or destruction or for any claim whatsoever in any way arising out of or in consequence of the said collision; or if your petitioners shall be adjudged liable, that their liability be limited to the sum of Three Hundred and Twenty-five Thousand Twenty-eight and 79/100ths ($325,028.79) Dollars, plus whatever further sum may be fixed to cover the death of the decedent, Turner, as provided by the said Brussels Convention; and that any moneys decreed to be paid be divided pro rata among such [fol. 13] claimants as may duly prove their claims as hereinbefore provided, saving to all parties any priorities to which they may be legally entitled, and that a decree thereupon be entered discharging the petitioners from all further liability.

6. That the petitioners may have such other or further or different relief as the justice of the cause may require.

J. Vincent Keogh, Esq., for Petitioner, United States of America, Hunt, Hill & Betts, of Counsel. Hunt, Hill & Betts, Proctors for Petitioner, Black Diamond Steamship Corp., Office & P. O. Address: 120 Broadway, Borough of Manhattan, New York City.

(Verified on October 28, 1947, by Albert C. Valentine, as Secretary and Treasurer of Black Diamond Steamship Corp., one of the petitioners herein.)

[fol. 14] IN UNITED STATES DISTRICT COURT

[Title omitted]

BOND

AMERICAN SURETY COMPANY OF NEW YORK

Organized 1884

Whereas United States of America, as owner, and Black Diamond Steamship Corp., as bareboat charterer, of the steamship Norwalk Victory, are about to file in this Court their Petition for limitation of their liability in respect of a collision which occurred between the steamer Norwalk Victory and the British steamer Merganser in the Schelde

River, Belgium, on April 28, 1947, in which the petitioners pray, among other things, that their liability, if any, be limited in accordance with the provisions of the Brussels Limitation of Liability Convention signed August 25, 1924, and that a monition may issue to all persons claiming damages for loss, damage, injury or destruction resulting from said disaster, citing them to appear and file their claims with the Clerk of the Court and to make due proof of their respective claims and to answer the petition herein, and that an injunction issue restraining the prosecution of any and all actions, claims or proceedings except in pursuance of the provisions of a monition granted herein; and

[fol. 15] Whereas the petitioners wish to stay the further prosecution of the suit (No. 18593) entitled Robert Stewart & Sons, Ltd., Et Als, Libellants,—Against—SS Norwalk Victory, Her Engines, etc., Black Diamond Steamship Corporation and United States of America, Respondents, instituted against them on or about October 14, 1947, in this Court for damage to cargo allegedly resulting from the said collision, and the commencement or prosecution hereafter of any and all suits, actions or legal proceedings of any nature or description whatever in any and all Courts; and

Whereas said Petitioners wish to provide a bond in behalf of Black Diamond Steamship Corp. as security for any claims by reason or on account of said Collision to the extent to which the petitioners' liability, if any, should be limited under the provisions of the said Brussels Convention, and

Whereas, the petitioner, United States of America, being a Corporation Sovereign, is not obliged to give such a bond;

Now, therefore, in consideration of the premises, said Petitioner, Black Diamond Steamship Corp., as Principal, and American Surety Company of New York, of No. 100 Broadway, Borough of Manhattan, City of New York, as Surety, hereby jointly and severally undertake in the sum of Three hundred and twenty-five thousand twenty-eight and 79/100ths ($325,028.79) Dollars, with such interest thereon as may be awarded by the Court, that if any of the persons who are party libellants to the said suit No. 18593, or any other persons making, within the time to be prescribed in such monition, any claims arising out of the said collision, recover thereon, the decree or decrees may be entered against them and each of them for an amount or amounts not exceeding in all the beforementioned sum with

[fol. 16] interest thereon as aforesaid, and said Principal and Surety do consent and agree that thereupon execution therefor may issue against their and each of their goods, chattels, lands and tenements or other real estate.

And the said Black Diamond Steamship Corp., as such Principal, and said American Surety Company of New York, as such Surety, do hereby further jointly and severally undertake that they the said Principal and Surety shall abide by all orders of the Court, interlocutory or final and pay such amounts as may be respectively awarded by the final decree or final decrees rendered by this Court or by any Appellate Court if an appeal intervene, with interest as aforesaid, in all not exceeding the beforementioned sum, together with such interest as may be awarded by the Court, then this obligation to be void, otherwise to remain in full force and virtue.

Provided, however, That the total liability in all upon this instrument shall not exceed the beforementioned sum of Three hundred twenty-five thousand twenty eight and 79/100 Dollars ($325,028.79) with interest thereon as aforesaid, and this instrument shall to that extent stand only as security for all claims properly filed in the said limitation proceeding.

Signed, sealed and dated this 28th day of October 1947.

Black Diamond Steamship Corp. By: M. J. Hanlon, Vice Pres. American Surety Company of New York, by: Leon Sekeson, [L. s.] Resident Vice President, Attest: M. S. Godwin, Resident Ass't Secretary.

(Financial statements, acknowledgments, etc. omitted.)

[fol. 17] In United States District Court

Exceptions to Petition.

Robert Stewart & Sons, Ltd., et als., claimants (heretofore having duly filed in this Honorable Court a libel in an independent cause of cargo damage, civil and maritime, No. 18593, against the S. S. Norwalk Victory, and her owners and operators who are the petitioners herein), ex-

cept to the petition for exoneration from or limitation of liability herein on the following grounds:

First: That the allegations of the petition are insufficient to give this Honorable Court jurisdiction of a statutory proceeding for the limitation of liability in that the requirements of the Limitation of Liability Statutes, Title 46, U. S. Code, Chapter 8, have not been complied with.

Second: That this Court may not take jurisdiction of this limitation of liability proceeding as petitioners have not deposited with the Court a sum, or approved security therefor, equal to the amount or value of the interests of such owners in the vessel and freight, nor have the interests of such owners therein been transferred to a trustee, as required by Title 46, U. S. Code, Section 185.

Third: That this Court should decline jurisdiction of this limitation of liability proceeding because petitioners have not complied with the applicable Rules of Practice in Admiralty and Maritime Cases promulgated by the Supreme Court (Title 28, U. S. Code, following Section 723), namely Rules 51, 52, 53 and 54.

[fol. 18] Fourth: That this Court should decline jurisdiction of this limitation of liability proceeding because petitioners have not complied with the Admiralty Rules of this Court now in effect, namely Rules 31, 32, 33, 34 and 35.

Dated: New York, N. Y., November 5, 1947.

Dow & Symmers, Proctors for Claimants, 70 Pine Street, New York 5, New York.

[fol. 19] IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION ON HEARING ON EXCEPTIONS

SIRS:

Please take notice that the exceptions taken by Robert Stewart & Sons, Ltd., cargo damage claimants herein, to the petition for exoneration from and limitation of liability of the above-named owner and bareboat charterer of the SS Norwalk Victory will be brought on for argument and a motion made to sustain said exceptions and dismiss said petition before the Honorable Robert A. Inch, United

States District Judge, in his chambers, Room 310, United States District Court, Post Office Building, Washington Street, Borough of Brooklyn, City and State of New York, on the 6th day of November, 1947, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated: November 5, 1947.

Yours, etc., Dow & Symmers, Proctors for Damage Claimants, 70 Pine Street, New York 5, New York.

To: Messrs. Hunt, Hill & Betts, Proctors for Petitioners, 120 Broadway, New York, New York.

[fol. 20] IN UNITED STATES DISTRICT COURT

ORDER DISMISSING PETITION

The petitioners herein, having filed on October 28, 1947, a petition for limitation of and exoneration from liability in respect of a collision between the petitioners' American S.S. Norwalk Victory and the British S.S. Merganser, which occurred in the River Scheldt, Belgium, on April 28, 1947, which petition alleges and invokes the law of Belgium with respect to limitation of shipowners' liability as the law applicable to the proceedings herein; and petitioner Black Diamond Steamship Company, as bareboat charterer of the said S.S. Norwalk Victory, valued in the petition at $1,000,000.00, having filed on October 29, 1947, a stipulation for limitation of liability in an amount of $325,028.79, alleged to be sufficient security under the said Belgian law; and certain damage claimants, owners of cargo lost or damaged on the S.S. Merganser, having heretofore filed a libel against the S.S. Norwalk Victory and the petitioners herein as her owners and operators, and said damage claimants having duly filed their exceptions herein to the said petition for limitation of liability on the grounds, among others, (1) that the allegations of the petition are insufficient to give this Court jurisdiction of a statutory proceeding for limitation of liability in that the requirements of the Limitation of Liability Statutes, Title 46, U. S. Code, Chapter 8, have not been complied with, and (2) that this Court may not take jurisdiction of this limitation of liability

proceeding as petitioners have not deposited with the Court a sum, or approved security therefor, equal to the amount or value of the interests of said petitioners in the vessel and [fol. 21] freight, nor have the interests of said petitioners been transferred to a trustee, as required by Title 46 U. S. Code, Section 185, and the Admiralty Rules of the United States Supreme Court and of this Court applicable thereto; and said damage claimants, by their proctors, Dow & Symmers, Esqs., having duly brought said exceptions on for argument before the Honorable Robert A. Inch, United States District Judge, on November 6, 1947, and having moved for an order sustaining said exceptions and dismissing the petition, and after hearing Messrs. Dow & Symmers, proctors for damage claimants, by William G. Symmers and John S. Stillman, Esqs., in support of the motion, and Messrs. Hunt, Hill & Betts, proctors for the petitioners, by John W. Crandall and Robert M. Donohue, Esqs., in opposition thereto, and due deliberation having been had, and this Court having determined that the exceptions herein must be sustained and the motion dismissing the petition granted, on authority of *Oceanic Steam Navigation Co.* v. *Mellor* (The Titanic), 233 U. S. 718, and *Royal Mail Steam Packet Co.* v. *Companhia de Navegaco Lloyd Brasileiro*, 31 Fed. (2d) 757, 50 Fed. (2d) 207, aff'd 55 Fed. (2d) 1082, cert. den. 287 U. S. 607, holding that the procedures and jurisdictional requirements on limitation of liability, including provisions as to petitioner's stipulation for value, must be controlled by the Limitation of Liability Statutes of the United States where the jurisdiction of a United States Court is invoked.

Now, on motion of Dow & Symmers, Esqs., proctors for the damage claimants, it is

Ordered that the exceptions of the damage claimants herein be and the same hereby are sustained, and it is further

[fol. 22] Ordered that the petition for limitation of or exoneration from liability herein be and the same hereby is dismissed.

Dated, Brooklyn, N. Y., November 10, 1947.

Robert A. Inch, U. S. D. J.

IN UNITED STATES DISTRICT COURT

Findings of Fact and Conclusions of Law

FINDINGS OF FACT.

The Court makes the following findings of fact in accordance with its written decision and order filed herein on or about November 10, 1947, wherein the exceptions of the damage claimants to the petition herein were sustained and the petition dismissed. These findings are based upon the allegations in the petition, are admitted by the damage claimants solely for the purpose of the exceptions, and are not to be construed as findings other than for the purpose of disposing of such exceptions:

1. The petitioner, United States of America, is a corporation sovereign and at the times stated herein was the owner of the steamship Norwalk Victory.

2 The petitioner, Black Diamond Steamship Corp., is a corporation organized and existing under the laws of [fol. 23] Maryland, with an office and place of business at No. 39 Broadway, New York City, N. Y., and at the times stated herein was the bareboat charterer of the Norwalk Victory.

3. The Norwalk Victory is a steel screw steamer of 7,606 tons gross and 4,549 tons net register, about 455 feet long, 62 feet beam and 38 feet depth, and was built in Portland, Oregon, in 1945.

4. On April 28, 1947, the Norwalk Victory was completing a voyage from New York to Antwerp, Belgium, and Rotterdam, The Netherlands, on which voyage she put into Antwerp as the first port of call.

5. The Norwalk Victory left her berth at Antwerp, bound for Rotterdam, at 7:50 P. M., European Central Time, with 1150 tons of cargo aboard.

6. While proceeding down the Schelde River the Norwalk Victory collided with the British steamer Merganser at 11:45 P. M., on April 28, 1947, in the vicinity of Lillo, Belgium, and in the territorial waters of Belgium.

7. The Merganser was loaded with cargo, and as a result of the aforesaid collision she sank and her chief steward was killed.

8. Thereafter a suit was brought by British and Continental S. S. Co., Ltd., owner of the Merganser, against the petitioner, Black Diamond Steamship Corp., in the High Court of Justice of England, Probate, Divorce and Admiralty Division, for the loss of the Merganser. In that suit the petitioner, Black Diamond Steamship Corp., posted bail in pounds sterling, which, at the current rate of exchange, was equivalent to One Million ($1,000,000) Dollars.

[fol. 24] 9. Thereafter a suit was brought against the steamship Norwalk Victory and the petitioners in this Court by Robert Stewart & Sons, Ltd., and nineteen others, stated to be owners of cargo on the Merganser at the time of the collision, and alleging that such cargo was lost as a result thereof. The damages claimed in the said suit aggregate One Million ($1,000,000.) Dollars.

10. No written notice of claim was given to the petitioners, or either of them, by anyone more than six months prior to the filing of their petition for limitation of liability in this Court.

11. The law of Belgium as to limitation of liability is the International Convention for the Unification of Certain Rules of Law Relating to the Limitation of Liability of Owners of Seagoing Vessels, hereafter called the Brussels Limitation Convention.

12. The Brussels Limitation Convention was signed at Brussels on August 25, 1924, was ratified by Belgium on June 2, 1930, and first took effect on June 2, 1931.

13. The Brussels Limitation Convention, in Article 1, limits the liability of the owners of a seagoing vessel to an amount equal to her value, freight, and accessories in respect of compensation due to third parties by reason of damage caused by the acts or faults of the master, crew, pilot or any other person in the service of the vessel provided, however, that such liability shall not exceed an aggregate sum equal to £8. per ton of the vessel's tonnage.

14. Article 4 of the Brussels Limitation Convention provides that the freight referred to in Article 1 thereof is deemed to be a lump sum fixed at all events at ten per cent [fol. 25] of the vessel's value at the commencement of the voyage.

15. Article 7 of the said Convention provides that in the case of death or personal injury caused by the acts or faults of the captain, crew, pilot or any other person in the service of the vessel, the owner of the vessel is liable to the decedents or their representatives in an amount exceeding the limit of liability provided for in the preceding Articles, up to £8. per ton of the vessel's tonnage.

16. Article 10 of the said Convention makes its provisions applicable to a person who operates the vessel without owning it or who, as the principal charterer thereof, is liable under Article 1 or Article 7 of the Convention."

17. Article 11 of the said Convention provides that tonnage is to be calculated for steamers on the basis of their net tonnage, with the addition of the amount deducted from the gross tonnage on account of engine room space for the purpose of ascertaining the net tonnage.

18. The net tonnage of the Norwalk Victory is 4,549 tons and the amount deducted from her gross tonnage on account of engine room space to ascertain her net tonnage is 2,434.05 tons, which two figures added together equal 6,983.05 tons.

19. The sound value of the Norwalk Victory at the commencement of the voyage in question was One Million ($1,000,000.) Dollars.

20. The limitation of liability provided by the Brussels Limitation Convention for property damage on the basis of the figures set forth in the two preceding Findings is [fol. 26] 55,864.40 pounds or $225,028.79, at the rate of exchange of $4.02-13/16ths prevailing on April 28, 1947, plus $100,000., being 10% of the vessel's sound value at the commencement of the voyage, making a total of $325,028.79.

21. The petitioner, Black Diamond Steamship Corp., on October 29, 1947, filed a surety bond with the Clerk of this Court in the sum of $325,028.79, in connection with the petitioners' aforesaid petition for limitation of liability herein.

Conclusions of Law

1. The right of a vessel owner to limit liability in a Court of the United States is derived from, created and exclusively controlled by the Limitation of Liability Statutes of the United States (Title 46 U. S. Code, Chapter 8, Secs. 181-188).

2. The Limitation of Liability Statutes of the United States (supra) do not impose, but only limit, an existing liability. They are not a part of the general maritime law, but are a declaration of a general policy of the United States for the administration of justice in maritime cases. They relate not to the substantive rights giving rise to the liability, but to the remedy, and that is governed by the law of the forum.

3. The fact that the collision took place in foreign territorial waters, or that one of the ships involved in the collision was British and the other American, in no way affects or alters the principles above stated.

4. In order for a District Court of the United States to assume jurisdiction of a petition for limitation of liability, [fol. 27] the petitioner must comply with the conditions imposed by the Limitation of Liability Statutes of the United States (supra).

5. Petitioner, Black Diamond Steamship Corp., having failed to deposit with this Court for the benefit of claimants "a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor", as required by Title 46 U. S. Code Sec. 185, has not met the statutory requirements to give this Court jurisdiction herein, and the petition must, therefore, be dismissed on the exceptions thereto.

6. The allegations of the petition, alleging a right to limitation of liability in accordance with the limitation of liability laws of Belgium, are insufficient in law and the exceptions to the petition must be sustained.

Dated, Brooklyn, December 22, 1947.

Robert A. Inch, United States District Judge.

[fol. 28] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL

SIRS:

Please take notice that the petitioners herein hereby appeal to the United States Circuit Court of Appeals for the Second Circuit, from the order entered herein on or about November 10, 1947, sustaining the exceptions of the damage claimants to the petitioners' petition for exoneration from or limitation of liability herein and dismissing the said petition, and from each and every part of the said order.

Dated, New York, December 31, 1947.

J. Vincent Keogh, United States Attorney for the Eastern District of New York, Proctor for the Petitioner, United States of America. Hunt, Hill [fol. 29] & Betts, of Counsel, Office & P. O. Address: 120 Broadway, Borough of Manhattan, New York City. Hunt, Hill & Betts, Proctors for Petitioner, Black Diamond Steamship Corp.

To: Percy G. B. Gilkes, Esq., Clerk of the United States District Court for the Eastern District of New York. Messrs. Dow & Symmers, Proctors for the damage claimants, 70 Pine Street, New York City.

ORDER ALLOWING APPEAL

The within appeal is hereby allowed.

R. A. Inch, U. S. D. J.

Brooklyn, N. Y.

Dated, January 5, 1948.

[fol. 30] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR

The petitioners hereby assign the following errors in the decision and order of the District Court of the United States for the Eastern District of New York, entered herein on or about November 10, 1947, sustaining the exceptions of

the damage claimants to the petitioners' petition for exoneration from or limitation of liability herein and dismissing the said petition, and also to the Court's conclusions of law, filed herein on or about December 22, 1947:

1. In that the District Court sustained the exceptions of the damage claimants to the petition for limitation of the petitioners' liability herein.

2. In that the District Court failed to overrule the exceptions of the damage claimants to the said limitation petition.

3. In that the District Court made and entered an order dismissing the said limitation petition.

4. In that the District Court held that the allegations of the petition alleging a right to limitation of liability under the limitation of liability laws of Belgium are insufficient in law.

5. In that the District Court held that it could not assume jurisdiction of the said limitation petition without the petitioners' complying with all the conditions imposed by the [fol. 31] Limitation of Liability Statutes of the United States.

6. In that the District Court failed to hold that inasmuch as the collision between the steamers Norwalk Victory and Merganser took place within the territorial waters of Belgium the limitation of the petitioners' liability therefor is governed by the law of Begium, namely, The International Convention for the Unification of Certain Rules of Law relating to the Limitation of the Liability of Owners of Seagoing Vessels, commonly called the Brussels Limitation Convention.

7. In that the District Court, having found that $325,028.79 is the amount to which the petitioners' liability for the property damage herein is limited by the terms of the Brussels Limitation Convention, failed to accept the bond for $325,028.79 filed herein by the petitioner, Black Diamond Steamship Corp., and to hold that such bond was adequate security for such damage.

8. In that the District Court held that this case is governed by *Oceanic Steam Navigation Co. v. Mellor*, (The Titanic), 233 U. S. 718.

9. In that the District Court held that the right of a vessel owner to limit liability in a Court of the United States was created by and is exclusively controlled by the Limitation of Liability Statutes of the United States.

10. In that the District Court held that because the petitioner, Black Diamond Steamship Corp., did not deposit with the Court a sum equal to the amount or value of its interest in the Norwalk Victory and her freight, or approved security therefor, "as required by Title 46 U. S. [fol. 32] Code Sec. 185," it had not met the statutory requirements to give the Court jurisdiction of this proceeding.

11. In that the District Court held that limitation of liability is a matter of remedy and not of substantive right, and that, as a matter of remedy, it is governed by the law of the forum.

12. In that the District Court failed to hold that limitation of liability is a matter of substantive right, which is governed by the *lex loci delicti.*

13. In that the District Court relied on *Royal Mail Steam Packet Co.* v. *Compania de Navegaco Lloyd Brasileiro,* 31 Fed (2d) 757 (E. D. N. Y.), as an authority for dismissing the said limitation petition.

14. In that the District Court held that the fact that the collision involved herein occurred within the territorial waters of Belgium did not affect the principles stated by it.

15. In that the District Court failed to distinguish this case from *The Titanic, supra,* on the ground that here the collision occurred within the territorial waters of Belgium.

16. In that the District Court failed to apply the doctrine of *The Mandu,* 102 Fed. (2d) 459 (C. C. A. 2) and 114 Fed. (2d) 361 (C. C. A. 2) wherein this Court, considering a collision occurring within the territorial waters of Brazil, held the Brussels Collision Convention to be controlling not only in the determination of liability but its measure.

17. In that the District Court failed to hold that the determination of the amount to which a ship-owner's lia- [fol. 33] bility may be limited is indistinguishable in prin-

ciple from the determination of the measure of such liability.

Dated, December 31, 1947.

J. Vincent Keough, United States Attorney for the Eastern District of New York, Proctor for the Petitioner, United States of America. Hunt, Hill & Betts, Of Counsel, Office & P. O. Address: 120 Broadway, Borough of Manhattan, New York City. Hunt, Hill & Betts, Proctors for Petitioner, Black Diamond Steamship Corp.

[fol. 34] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO RECORD

It is hereby stipulated and agreed by and between the proctors for the respective parties that the foregoing is a transcript of the record of the District Court in these proceedings, as agreed on by the parties.

Dated, New York, January 30, 1948.

J. Vincent Keogh, Proctor for the Petitioner-Appellant, United States of America, Hunt, Hill & Betts, Of Counsel. Hunt, Hill & Betts, Proctors for Petitioner-Appellant, Black Diamond Steamship Corp. Dow & Symmers, Proctors for Damage Claimants-Appellees.

[fol. 35] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 36] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1947

No. 196

(Argued March 5, 1948. Decided March 29, 1948)

Docket No. 20911

UNITED STATES and BLACK DIAMOND STEAMSHIP CORPORATION, Appellants,

v.

ROBERT STEWART & SONS, LTD., et al., Appellees

Before L. Hand, Swan and Frank, Circuit Judges

Appeal from a decree in the admiralty of the District Court for the Eastern District of New York, dismissing a petition of the owner and the "bareboat" charterer of a vessel to limit their liability.*

John W. Crandall, for the appellants.

William G. Symmers, for the appellee.

[fol. 37] L. HAND, Circuit Judge:

This is an appeal from a decree in the admiralty, dismissing the petition of the United States, as owner, and of the Black Diamond Steamship Corporation, as "bareboat" charterer, to limit their liability, arising out of a collision in Belgian waters, between their ship and a British steamer. The claimants excepted to the petition, whose allegations must therefore be taken as true, and the substance of which is as follows, so far as they are here material. After the collision the owners of the British ship, which was sunk, sued the charterer in an English court, and in that suit it posted a bond in the "equivalent" of $1,000,000. The cargo owners have sued both petitioners in the Eastern District of New York for the loss of cargo, and it is this suit which the petition is designed to enjoin. Other suits are also probable. By the law of Belgium, which has accepted the Brussels Convention upon the Limitation of Shipowners' Liability of 1924, the liability of a shipowner

* §185, Title 46, U. S. Code.

for damages, resulting from a collision, is limited to eight pounds a gross ton, plus the freight, which is arbitrarily set at ten per cent of the vessel's value at the commencement of the voyage. In the case at bar these sums together amounted to about $325,000. The value of the petitioner's vessel is $1,000,000; but they have posted a bond in only the smaller amount and the question on this appeal is whether that satisfies the statute,* or whether a bond for $1,000,000 is necessary.

The petitioners argue that the limit to the collective liabilities of a shipowner, imposed by Article One of the Limitation of Liability Convention, attaches to the liabilities themselves in the same sense that the division of liability in cases of collision attaches under the Collisions [fol. 38] Convention of 1910.* The claimants reply that the Limitation of Liability Convention goes only to the remedy, as does our own statute.** Obviously, the answer depends upon the proper interpretation of Article One of the Limitation of Liability Convention, whose language is: "The liability of the owner of a sea-going vessel is limited to an amount equal to the value of the vessel, the freight and the accessories" etc. If the petition had said in so many words that this meant that the limit attached to the right, it would be conclusive upon exceptions, since it would have been an allegation as to foreign law, which is treated as an allegation of fact; and we are not to understand the decision in *The Titanic*, *supra*,† as meaning that we would refuse to recognize limits imposed upon an owner's liability by other nations which they attached to the right. In the form in which the case comes up we should read the petition with as favorable an eye as is possible, and we shall therefore construe it to mean that the Belgian law did attach the limit to the right. However, in so doing we wish to guard against any inference that this is our own interpretation of the article. With this as a premise the petitioners go on to argue that it cannot be necessary for them to post a bond for more than the amount of that sum which is the utmost that by any chance the claimants can

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* §185, Title 46, U. S. Code.

* *The Mandu*, 102 Fed. (2) 459 (C. C. A. 2).

** *The Titanic*, 233 U. S. 718.

† 233 U. S. 718.

recover; and that the words of the statute and of the Admiralty Rule,†† however they may read literally, should not be understood to effect an intention merely to impose an idle burden on the shipowner and to benefit no one but the bonding companies.

[fol. 39] We do not find it necessary to pass on that question, for the argument puts the petitioners in a dilemma from which they cannot escape. If in fact the limit of all their liabilities is $325,000 and their ship is worth $1,000,000, they have no right to commence such a proceeding as this at all, and are confined to asserting their privilege as a defense to any suits which may be brought against them.* If on the other hand they are wrong and the liabilities may go beyond $325,000, on their own argument the bond they propose is too small. Therefore the question which they raise does not arise upon the present record; nor could it arise unless the petitioners are sued at law. It is true that should a claimant deny their right to limit liability in an action at law brought by him, the issue so raised would be justiciable only in the admiralty and would draw the whole of that litigation into the admiralty,** and it then might be necessary to decide whether the bond should go beyond the amount of the liability. However, the only suit so far brought in this country is in the admiralty, in which the right to limit could be tried anyway. If the claimants were successful in defeating that right, obviously this proceeding would not be proper; if they were unsuccessful, the same reasons would forbid the proceeding as do so now. Thus as things stand, the petitioners are not entitled to resort to a forum concursus.

Decree affirmed.

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†† No. 51.

* *The Aquitania*, 20 Fed. (2) 457 (C. C. A. 2); *Curtis Bay Towing Co.* v. *Tug Kevin Moran*, 159 Fed. (2) 273 (C. C. A. 2); *The George W. Fields*, 237 Fed. Rep. 403 (S. D. N. Y.).

** *Ex parte Green*, 286 U. S. 437.

[fol. 40] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of March, one thousand nine hundred and forty-eight.

Present Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Jerome N. Frank, Circuit Judges.

In the Matter of the Petition of UNITED STATES, as Owner, etc., & BLACK DIAMOND STEAMSHIP CORP., as Charterer, of S. S. NORWALK VICTORY, etc.; UNITED STATES and BLACK DIAMOND STEAMSHIP CORPORATION, Petitioners-Appellants; ROBERT STEWART & SONS, LTD., et al., Claimants-Appellees.

Appeal from the District Court of the United States for the Eastern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 41] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re Petition of United States, and Black Diamond Steamship Co., etc., et al. 196. Judgment. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 29, 1948. Alexander M. Bell, Clerk.

[fol. 42] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 43] SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1948

No. 121

ORDER ALLOWING CERTIORARI—Filed October 11, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 44] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. 130

ORDER ALLOWING CERTIORARI—Filed October 11, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 53,123, 53,132. U. S. Circuit Court of Appeals, Second Circuit. Term No. 121. Black Diamond Steamship Corp., Petitioner, vs. Robert Stewart & Sons, Ltd., et al. Term No. 130. The United States of America, Petitioner, vs. Robert Stewart & Sons, Ltd., et al. Petitions for writs of certiorari and exhibit thereto. Filed June 25, 1948, June 28, 1948. Term No. 121 O.T. 1948, 130 O.T. 1948.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM—1948

No. 121

IN THE MATTER
of the
Petition of the UNITED STATES OF AMERICA, as owner, and BLACK DIAMOND STEAMSHIP CORP., as bareboat charterer, of the Steamship "NORWALK VICTORY", for exoneration from or limitation of liability.

BLACK DIAMOND STEAMSHIP CORP.,
Petitioner
(Petitioner-Appellant below),

ROBERT STEWART & SONS, LTD., *et al.*,
Respondents
(Damage-Claimants-Appellees below).

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOHN W. CRANDALL,
Counsel for the Petitioner,
Black Diamond Steamship Corp.

JUDICIAL PRINTING CO., INC., 80 RICHMOND ST., N. Y.—HANOVER 2-0262 1948

INDEX

	PAGE
Petition for a Writ of Certiorari	1
Jurisdiction	2
Statement	2
Decisions Below	4
Questions Presented	5
Specifications of Error to Be Urged	7
Reasons for Granting the Writ	8
Brief in Support of Petition	11
Summary of Argument	11
POINT I—The Court below, in holding that the petitioner has not shown itself entitled to file this petition for the limitation of its liability to the amount fixed by the law of Belgium, where the tort occurred, has rendered a decision on a Federal question which is in probable conflict with applicable decisions of this Court	11
POINT II—The soundness of the Titanic decision, it is believed, is extremely doubtful. It is therefore respectfully suggested that it be re-examined and, if not overruled, that it at least be modified to bring it into harmony with the earlier decisions of this Court in similar situations	16
POINT III—The dismissal of this limitation petition presents to this Court for the first time the question as to whether a ship-owner, in the case of a collision in the waters of a foreign country,	

PAGE

is entitled to file a petition in a United States court asking that its liability be limited to the amount provided by the law of such foreign nation 21

POINT IV—The questions presented are of extreme importance and of unusual interest, not only in the United States but abroad 24

Conclusion 24

TABLE OF AUTHORITIES CITED.

Cases.

American Banana Co. v. United Fruit Co., 213 U. S. 347 . . . . . 6, 7, 14, 19

Aquitania, The, 20 Fed. (2d) 457 (C. C. A. 2) 8, 10, 15

Belgenland, The, 5 Sup. Ct. Rep. 860 (114 U. S. 355) 7, 9, 17

Bourgogne, La, 210 U. S. 95 . . . . . 7, 10, 18, 20

Chickie, The, 141 Fed. (2d) 80 (C. C. A. 3) 20

Coryell v. Phipps, 317 U. S. 406 23

Cuba Railroad Company v. Crosby, 222 U. S. 473 . . . . 6, 14

Curtis Bay Towing Co. v. Tug Kevin Moran, 159 Fed. (2d) 273 (C. C. A. 2) 8, 10, 15

George W. Fields, The, 237 Fed. 403 (S. D. N. Y.) . . 8, 10, 15

Green, Ex Parte, 286 U. S. 437 . . . . . 21, 22

Langes v. Green, 282 U. S. 531 22

Larsen v. Northland Trans. Co., 292 U. S. 20 23

Lauria v. E. I. Du Pont de Nemours & Co., Inc., 241 Fed. 687 (E. D. N. Y.) 14

Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397 3

PAGE

Loucks v. Standard Oil Co., 224 N. Y. 99 14

Mandu, The, 102 Fed. (2d) 459 (C. C. A. 2) 14, 20
Mandu, The, 114 Fed. (2d) 361 (C. C. A. 2) 15
Mosby v. Manhattan Oil Co., 52 Fed. (2d) 364 (C. C. A. 8) 14

Northern Pacific R. Co. v. Babcock, 14 Sup. Ct. Rep. 978 (154 U. S. 190) 6, 12

Oceanic Steam Navigation Company, Limited v. Mellor (The Titanic), 233 U. S. 718 ..... 4, 6, 7, 9, 11, 16, 19, 20, 24

Royal Mail Steam Packet Co. v. Companhia de Navegacao Lloyd Brasileiro, 31 Fed. (2d) 757 (E. D. N. Y.) 4, 20

Scotland, The, 105 U. S. 24 ..... 7, 9, 16, 17, 18, 19, 20, 23
Shapleigh v. Mier, 83 Fed. (2d) 673 (C. C. A. 5) 3
Slater v. Mexican National R. R. Co., 194 U. S. 120 ..... 6, 12, 13
Suspine, et al. v. Compania Transatlantica Centro-americana, S. A., et al., 37 Fed. Supp. 263 (S. D. N. Y.) 3

Talbot v. Seeman, 1 Cranch. 1 3
Thommessen and another v. Whitwill (The Great Western), 6 Sup. Ct. Rep. 1172 (118 U. S. 520) 7, 9, 10, 17
Titanic, The, 209 Fed. 501 (S. D. N. Y.) 18
Titanic, The, 209 Fed. 513 (C. C. A. 2) 18

United States, et al. v. Robert Stewart & Sons, Limited, et al., 167 Fed. (2d) 308 (C. C. A. 2) 5
United States Navigation Co., Inc. v. Black Diamond Lines, Inc., 37 Fed. Supp. 1005 (S. D. N. Y.) 3

Western Union Telegraph Company v. Brown, 234 U. S. 542 ..... 7, 13, 20

Conventions and Statutes.

PAGE

Brussels Limitation Convention 2, 3, 4, 6, 7, 11, 15, 22

Brussels Collision Convention 14

Judicial Code, Section 240(a), as amended by the Act of February 17, 1925, 28 U. S. C. A. § 347(a) 2

R. S. 4283 ..... 18, 22, 24

R. S. 4285 ..... 6, 7, 8, 9, 18, 24

46 U. S. C. A. §§ 181-188 4

46 U. S. C. A. § 185 ..... 5, 6, 21

Carriage of Goods by Sea Act, 46 U. S. C. A. § 1304(5) 20

Rules of the Supreme Court.

General Rule 38, § 5, subd. (b) 2

Rules in Admiralty, 54 and 56 18

IN THE

Supreme Court of the United States

OCTOBER TERM—1948

No.

IN THE MATTER

of the

Petition of the UNITED STATES OF AMERICA, as owner, and BLACK DIAMOND STEAMSHIP CORP., as bareboat charterer, of the Steamship "NORWALK VICTORY", for exoneration from or limitation of liability.

BLACK DIAMOND STEAMSHIP CORP.,

Petitioner
(Petitioner-Appellant below),

ROBERT STEWART & SONS, LTD., *et al.*,

Respondents
(Damage-Claimants-Appellees below).

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner herein, Black Diamond Steamship Corp., prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, to review a decree of that Court entered March 29, 1948 (R. 39), affirming an order of the United States District Court for

the Eastern District of New York, which sustained the exceptions of the respondents to the petition for limitation of liability herein and dismissed the petition (R. 20-22).

Jurisdiction.

The date of the decree of the Circuit Court of Appeals to be reviewed is March 29, 1948 (R. 39). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 17, 1925, 28 U. S. C. A. § 347(a) and under General Rule 38 of this Court § 5, subd. (b).

Statement.

This case arises out of a collision between the American steamer *Norwalk Victory*, of which the United States of America is the owner and the petitioner the bareboat charterer, and the British steamer *Merganser*, in the Schelde River, Belgium, on April 28, 1947. The respondents, owners of cargo on the *Merganser*, which was lost as a result of the collision, sued the petitioner and the United States in the United States District Court for the Eastern District of New York, demanding damages amounting to $1,000,000.

Thereafter the petitioner and the United States, within the six-months statutory period, filed a petition requesting limitation of their liability under the law of Belgium, which is the International Convention for the Unification of Certain Rules of Law Relating to the Limitation of Liability of Owners of Seagoing Vessels. This Convention was signed at Brussels on August 25, 1924, was ratified by Belgium on June 2, 1930, and first took effect on June 2, 1931 (R. 2-13). For brevity, it will be called the Brussels Limitation Convention.

Since the respondents' exceptions perform the function of a demurrer, all well pleaded allegations of fact in the

petition stand as admitted for the purpose of the exceptions. *Suspiro et al. v. Compañia Transatlantica Centro-americana, S. A., et al.*, 37 Fed. Supp. 263, 264 (S. D. N. Y.); *United States Navigation Co., Inc. v. Black Diamond Lines, Inc.*, 37 Fed. Supp. 1005 (S. D. N. Y.). This admission also includes the allegations regarding the law of Belgium, which, of course, is a matter of fact. *Talbot v. Seeman*, 1 Cranch, 1; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397; and *Shapleigh v. Mier*, 83 Fed. (2d) 673, 676 (C. C. A. 5).

The facts alleged in the limitation petition, so far as relevant to this petition, are these:

The *Norwalk Victory*, when the collision occurred, was engaged on a voyage from New York to Antwerp, Belgium, and Rotterdam, The Netherlands. She left Antwerp for Rotterdam at ~~7:50~~ P. M., on April 28, 1947, with some 1150 tons of cargo aboard. While proceeding down the Schelde River she collided with the British steamer *Merganser* at 11:45 P. M. near Lille, Belgium. The *Merganser* was sunk and her chief steward was killed.

Shortly afterward British and Continental S. S. Co. Ltd., owner of the *Merganser*, sued the petitioner in the High Court of Justice of England, Probate, Divorce and Admiralty Division, for the loss of the vessel. In that suit the petitioner was required to post bail in pounds sterling equivalent to $1,000,000.

About six months later the suit on which this petition is based was brought against the petitioner and the United States in this country (Petition, Arts. Fifth and Seventh; R. 3-5, 7; Findings of Fact Nos. 4-9; R. 23, 24).

Article 1 of the Brussels Limitation Convention limits the liability of the owners of a seagoing vessel to an amount equal to her value, freight and accessories with respect to compensation due to third parties because of damage caused by the faults of the master, crew or pilot of the ves-

sel, provided, however, that such liability shall not exceed an aggregate sum equal to £8. per ton of the vessel's tonnage. Article 4 defines the freight as a lump sum fixed at 10% of the vessel's value at the commencement of the voyage. Article 7 provides for an additional payment of £8. per ton in the case of death or personal injury. Article 10 makes the Convention applicable to an operator or charterer who is liable under Article 1 or Article 7. Article 11 provides for the calculation of tonnage, which is net tonnage plus the amount deducted from the gross tonnage on account of engine room space to ascertain the net tonnage (Petition, Arts. Tenth-Twelfth; R. 8-10; Findings of Fact Nos. 11-17; R. 24, 25).

On the basis of the *Norwalk Victory's* tonnage, calculated as provided in the Convention, plus $100,000, or 10% of her sound value at the commencement of the voyage, the limitation of the petitioner's liability and that of the United States for property damage under the Convention is $325,028.79. The United States, as a corporation sovereign, was of course not required to give a bond. The petitioner, however, posted a surety bond for $325,028.79 (Petition, Art. Thirteenth, R. 10; Findings of Fact Nos. 18-21; R. 25, 26; Bond, R. 15, 16).

Decisions Below.

The District Court's decision is incorporated in its order of dismissal (R. 20-22), to which Conclusions of Law were added (R. 26, 27). The Court dismissed the petition on the authority of *Oceanic Steam Navigation Company, Limited* v. *Mellor* (*The Titanic*), 233 U. S. 718, and *Royal Mail Steam Packet Co.* v. *Companhia de Navegacão Lloyd Brasileiro*, 31 Fed. (2d) 757 (E. D. N. Y.). It held that a ship-owner's right to limit its liability in a United States Court is derived exclusively from our limitation of liability statute, 46 U. S. C. A. §§ 181-188, which does not in-

pose a liability but only limits an existing liability, and so does not relate to the substantive right but to the remedy, which is governed by the law of the forum; that it is a jurisdictional requirement under 46 U. S. C. A. § 183, that a sum, or approved security therefor, be deposited with the Court for the benefit of the damage claimants equal to the value of the ship-owner's interest in the vessel and her freight, and that the petitioner had not met this requirement. The Court held, finally, that the fact that the collision took place in Belgian waters did not affect the principles stated (Order, R. 20-22; Conclusions of Law, R. 26, 27). There is no official report of the decision.

The Circuit Court of Appeals, *United States, et al.* v. *Robert Stewart & Sons Limited, et al.*, 167 Fed. (2d) 308 (C. C. A. 2), said that if the petition had alleged that the limitation of liability provided by the Brussels Limitation Convention meant that the limit attached to the right, it would have been conclusive upon the exceptions. Nevertheless it construed the Belgian limitation as one attaching to the right. In spite of this, the Court, as we understand its opinion, sustained the order dismissing the petition on these grounds: First, if the liabilities of the petitioner and the United States are $325,000 under the Belgian law and the *Norwalk Victory* is worth $1,000,000, they had no right to commence this limitation proceeding but are confined to asserting their privilege as a defense to suits against them; second, if, on the other hand, their liabilities exceed $325,000 the bond filed by the petitioner was too small (R. 38).

Questions Presented.

1. In the case of a collision between an American vessel and a British vessel in the waters of Belgium, where a suit for damages based thereon has been brought in a United States Court, is limitation of the ship-owner's

liability, as distinguished from the means employed to secure such limitation, determined by the law of Belgium or that of the United States?

2. Is the limitation of a ship-owner's liability, as distinguished from the modes of procedure used to secure it, a matter of right or a matter of remedy?

3. Is a ship-owner who relies on limitation of liability under a foreign law in a United States Court restricted to pleading the foreign law as a defense in a suit against him or can he also invoke such law by a petition for limitation of liability under R. S. § 4285, 46 U. S. C. A. § 185, wherein a concourse of the claimants can be secured?

4. Is the limitation of a ship-owner's liability provided by the Brussels Limitation Convention a limitation attached to the right?

5. If limitation of the petitioner's liability is determined by the law of Belgium, is it permissible for the petitioner to claim the Belgian limitation in a limitation proceeding filed under R. S. § 4285, and, if so, would not the amount of the petitioner's interest in the vessel and her freight be that fixed by the Belgian law rather than the law of the United States?

6. Is the *Titanic* decision, *supra*, holding that limitation of liability is a limitation on the remedy, which is governed by the law of the forum, correct, and if not, should it not be overruled?

7. Is the decision in *The Titanic* in harmony with this Court's decisions on conflict of laws in *Northern Pacific R. Co.* v. *Babcock*, 14 Sup. Ct. Rep. 978 (154 U. S. 190); *Slater* v. *Mexican National R. R. Co.*, [redacted] U. S. 120; *Cuba Railroad Company* v. *Crosby*, 222 U. S. 473; *American*

Baviana Co. v. *United Fruit Co.*, 213 U. S. 347, and *Western Union Telegraph Company* v. *Brown*, 234 U. S. 542?

8. Is not the *Titanic* case in any event distinguishable from this one on the ground that there the disaster occurred on the high seas, whereas in the present case the collision occurred in foreign territorial waters?

9. Does the *Titanic* decision accord with the rule on conflict of laws applied by this Court in *The Scotland*, 105 U. S. 24; *The Belgenland*, 5 Sup. Ct. Rep. 860 (114 U. S. 355); *Thommessen and another* v. *Whitwill* (*The Great Western*), 6 Sup. Ct. Rep. 1172 (118 U. S. 520) and *La Bourgogne*, 210 U. S. 95, and, if not, should it not be modified to bring it into harmony with those decisions?

Specifications of Error to Be Urged.

The Circuit Court of Appeals Erred:

1. In affirming the order of the District Court dismissing the petition herein for limitation of liability.

2. In failing to hold that this petition was properly filed under R. S. § 4285.

3. In failing to hold that since the collision occurred within the territorial waters of Belgium, the limitation of liability provided by the Brussels Limitation Convention applies.

4. In failing to hold that limitation of a ship-owner's liability is a matter of right which is governed by the *lex loci delicti*.

5. In failing to hold that the limitation of liability provided by the Brussels Limitation Convention is a limita-

tion attaching to the respondents' rights and measures the extent of their recoveries against the petitioner.

6. In failing to hold that the petitioner's interest in the *Norwalk Victory* for the purpose of limitation of liability in the case of property damage is $325,028.79, under the provisions of the Brussels Limitation Convention, and that the posting of a bond for that amount by the petitioner was sufficient compliance with R. S. § 4285.

7. In holding that the decisions in *The Aquitania*, 20 Fed. (2d) 457 (C. C. A. 2), *Curtis Bay Towing Co.* v. *Tug Kevin Moran*, 159 Fed. (2d) 273 (C. C. A. 2), and *The George W. Fields*, 237 Fed. 403 (S. D. N. Y.) govern this case.

8. In holding that the question presented by this petition could not arise unless the petitioner were sued at law.

Reasons for Granting the Writ.

1. The Court below, in holding that the petitioner is not entitled to invoke the Belgian law as to limitation of liability by a petition for limitation of liability, but is confined to pleading the Belgian law as a defense to the libel of the respondents herein, has decided an important question of federal law which has not been, but should be, settled by this Court.

2. If it be held that limitation of liability is a matter of right and not of remedy, it is important that it be decided whether a ship-owner, sued in a court of the United States for damages arising out of a collision in foreign territorial waters, can claim the limitation of liability provided by the law of the place of the tort by way of petition, or whether it is restricted to pleading the foreign limitation of liability as a defense in its answer to the libel.

3. It is likewise important that it be determined whether the term "interest", used in R. S. § 4285, is to be construed literally in all cases as meaning the value of the shipowner's whole interest in the vessel and her freight, or whether in the case of a tort occurring in a foreign country, such as this one, the term will be construed broadly in favor of the petitioner and be held to mean the owner's interest for purposes of limitation of liability as fixed by the law of such foreign country.

4. The Court below, in failing to hold that the limitation of the petitioner's liability is governed by the law of Belgium, has decided a Federal question in a way which is probably in conflict with applicable decisions of this Court, namely, those cited *supra*, pages 6, 7, in subdivision (7) of the heading "Questions Presented".

5. Although the Court below clearly indicated that in its opinion the *Titanic* decision would not apply if the Belgian limitation attaches to the right, the District Court dismissed the petition on the authority of *The Titanic*. The *Titanic* decision is therefore involved herein and it is necessary, we believe, that this Court determine what bearing, if any, it has on this case.

6. The *Titanic* decision, we submit, should be re-examined with a view to determining whether the statements therein, that limitation of liability is a limitation on the remedy which is governed by the law of the forum, are correct, and reconcilable with this Court's decisions cited *supra*, pages 6, 7, in subdivision (7) under the heading "Questions Presented", and, if not, whether the *Titanic* decision should not be overruled.

7. If the *Titanic* decision is not overruled, it should, we submit, at least be modified to accord with the rule on conflict of laws laid down by this Court in *The Scotland*, *The Belgenland*, *Thommessen and another* v. *Whitwill*, (*The*

Great Western) and *La Bourgogne* (*supra*, p. 7) which involved collisions on the high seas.

8. The Court below, it is believed, erroneously considered this case as falling within the rule stated in *The Aquitania*, *Curtis Bay Towing Co.* v. *Tug Kevin Moran*, and *The George W. Fields* (*supra*, p. 8), wherein the value of the vessels greatly exceeded the total of all known or foreseeable claims, whereas the limitation claimed here is about one-third of the total claims for which the petitioner has been sued in the United States.

9. The questions involved are of great importance, and the case is one of general interest, not only in the United States but in England and the Continent, the disaster at present involving litigation in the Courts of England and the United States, with the probability of additional litigation in Belgium.

WHEREFORE, your petitioner, referring to the annexed brief in support of the foregoing reasons for review, respectfully prays that this Honorable Court issue a writ of certiorari, directing the United States Circuit Court of Appeals for the Second Circuit to certify and send to this Court a full and complete transcript of the record herein, to the end that the said cause may be reviewed and determined by this Court, as provided by law, and that the decree of the Circuit Court of Appeals may be reversed, and that your petitioner may have such other and further relief as to this Honorable Court may seem just.

Dated, June 22, 1948.

BLACK DIAMOND STEAMSHIP CORP.,
Petitioner.

By JOHN W. CRANDALL,
Counsel for Petitioner.

BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI.

Summary of Argument.

The petitioner's first point deals with this Court's decisions on conflict of laws in situations analogous to this one (pp. 11-16). The second point discusses the *Titanic* case and prior decisions of this Court involving collisions on the high seas (pp. 16-20). In the third point it is argued that the petitioner may properly claim the benefit of the Belgian limitation law by petition (pp. 21-23). The fourth and final point (p. 24) emphasizes the general interest in the case and the importance of the questions presented.

POINT I.

The Court below, in holding that the petitioner has not shown itself entitled to file this petition for the limitation of its liability to the amount fixed by the law of Belgium, where the tort occurred, has rendered a decision on a Federal question which is in probable conflict with applicable decisions of this Court.

As has been noted, the Court below said that if the petition had alleged that the limitation provided by the Convention was a limit attached to the right, it would have been conclusive upon exceptions. Nevertheless, without deciding the point, the Court construed the Belgian law as a limitation on the right. That this is so seems perfectly clear from the Convention. Article I (R. 8, 9), says: "The *liability* of the owner of a seagoing vessel is *limited* to an amount equal to the value of the vessel, etc."

(Italics ours.) It is just as if it had said that claimants are limited in their recoveries to the vessel's value, plus freight, as determined by the Convention. If this is a limitation attaching to the right—and it seems manifest that it is—it should be the one which governs under the rule laid down by this Court in similar cases.

In *Northern Pac. R. Co.* v. *Babcock*, 14 Sup. Ct. Rep. 978 (154 U. S. 190), the plaintiff, as administrator, sued in a Federal Court in Minnesota to recover damages for the death of the decedent, Munro, a Northern Pacific engineer. Munro was killed in Montana, which had no limit on the amount recoverable in a death case. In Minnesota, however, the limit of recovery for death when Munro was killed was $5,000, and $10,000 when the case was tried. The jury awarded the plaintiff $10,000. This Court (WHITE, *J.*) held that the right to recover and the amount of damages recoverable were governed by the *lex loci* and not by the *lex fori*.

In *Slater* v. *Mexican National R. R. Co.*, 194 U. S. 120, suit was brought in the United States Circuit Court in Texas to recover damages for the death in Mexico of the defendant, a switchman on the defendant railroad. Under the Mexican law a decree for damages in a death case was analogous to one for alimony, contemplating periodical payments and being subject to modification from time to time. The Court and jury, however, fixed the recovery in a lump sum under the Texas statute.

This Court (HOLMES, *J.*) said (p. 126):

> "The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found. * * * But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the

> existence of the obligation, *Smith* v. *Condry*, 1 How. 28, but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, *and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose.* • • • Therefore we may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught." (Italics ours.)

In *Western Union Telegraph Company* v. *Brown*, 234 U. S. 542, a telegram was despatched from South Carolina to the plaintiff in Washington, D. C. notifying her of her sister's death. Delivery was negligently delayed in Washington, causing the plaintiff to miss the funeral. She sued in a South Carolina State court under the South Carolina Civil Code, alleging mental anguish and consequent damages. A recovery was allowed under that Code, regardless of the Washington law.

This Court reversed the judgment, Mr. Justice HOLMES saying (pp. 546, 547):

> "Whatever variations of opinion and practice there may have been, it is established as the law of this court that when a person recovers in one jurisdiction for a tort committed in another he does so on the ground of an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere, and that is not only the ground *but the measure of the maximum recovery.* • • • (A limitation of liability *may* stand on different grounds, *The Titanic*, 233 U. S. 718). The injustice of imposing a greater liability than that created by the law governing the conduct of the parties at the time of the act or omission complained of is obvious; • • •" (Italics ours.)

See also: *Cuba Railroad Company* v. *Crosby*, 222 U. S. 473, 478, 479; *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 355, 356; *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99.

In *Mosby* v. *Manhattan Oil Co.*, 52 Fed. (2d) 364 (C. C. A. 8) the plaintiff, owner of a ranch in Kansas, sued the defendants in the federal court in Missouri for damages resulting from a nuisance created and maintained by the oil drilling and producing operations of the defendants. The defendants had been acting independently and not concurrently but could be sued jointly under the law of Kansas although not under the law of Missouri. The trial Judge held that the law of the forum applied and granted the defendants' motion for a directed verdict because of a misjoinder of parties. The Circuit Court of Appeals, however, pointed out that the extent of the liability of each defendant was quite different in the two States. It held that the difference between their laws was more than a procedural one and went to the extent or scope of the causes of action; that it was one of substantive right which was governed by the law of Kansas.

See also: *Lauria* v. *E. I. Du Pont de Nemours & Co., Inc.*, 241 Fed. 687, 693 (E. D. N. Y.).

The Court below has itself followed the same rule. In *The Mandu*, 102 Fed. (2d) 459 (C. C. A. 2), which involved a collision between the Brazilian steamer *Mandu* and the German steamer *Denderah* in Brazilian waters, it held that the Brussels Collision Convention of 1910, which was in force in Brazil, governed. The suit was brought against the *Mandu* by the underwriters of the cargo on the *Denderah*. Under the American rule, in the event of mutual fault, the cargo would have secured a 100% recovery against the *Mandu*, leaving her with the right of recoupment or set-off against the *Denderah's* owners. However, under the Brussels Collision Convention each vessel is liable to cargo only

in proportion to the fault charged against her. In a later decision on the merits, *The Maudu*, 114 Fed. (2d) 361 (C. C. A. 2), the Court found both vessels at fault, apportioning 4/5ths of the liability to the *Denderah* and 1/5th to the *Maudu*. This, of course, represented an 80% reduction in the amount cargo could have recovered from the *Maudu* under the American rule, which was actually a limitation of the ship's liability and was so recognized by the Court.

In the case at bar the Court expressed the opinion that the *Titanic* decision would not apply if the Belgian limitation attaches to the right (R. 37). Nevertheless it affirmed the District Court's order on the authority of *The Aquitania, Curtis Bay Towing Co.* v. *Tug Kevin Moran*, and *The George W. Fields* (*supra*, p. 8). But in those cases the value of the vessels far exceeded the known or foreseeable claims so that the petitioners showed no grounds whatever for initiating limitation proceedings.

The Court's reasoning, if we understand it correctly, was that if the liabilities of the petitioner and the United States are, say, $325,000, when the *Norwalk Victory's* value was $1,000,000, they had no right to commence this proceeding, whereas, if the liabilities may exceed $325,000, the bond posted is too small. But surely this does not settle the matter. The situation here is the reverse of those in the cases cited. The cargo claims in suit aggregate $1,000,000 (Petition, Art. 7, R. 7) as against a limitation of liability of $325,028.79 provided by the Brussels Convention. If the Belgian law is held applicable the vessel's value would be immaterial since it was not lower than £8. per ton, plus freight, as fixed by the Convention. If limitation were to be determined by our law the bond of $325,028.79 is of course too small. But since the Court seemingly was of the opinion that the Belgian law governs, if its limitation is attached to the right, we do not see how such cases as *The Aquitania* apply at all.

The lower Court, we submit, erred in failing to hold that the Convention places a limitation on the rights of claimants against the vessel, that the Belgian limitation law therefore governs, and that this petition is proper. Because of the extreme importance of the questions presented we believe that they should be reviewed by this Court on certiorari.

POINT II.

The soundness of the *Titanic* decision, it is believed, is extremely doubtful. It is therefore respectfully suggested that it be re-examined and, if not overruled, that it at least be modified to bring it into harmony with the earlier decisions of this Court in similar situations.

We have not assigned error to the lower Court's interpretation of the *Titanic* decision because it was in our favor. But since the District Court dismissed the petition on the authority of *The Titanic* (R. 21), and because the respondents' counsel doubtless will contend that the order should have been affirmed on that ground, a consideration of *The Titanic*, together with certain prior decisions of this Court, is advisable.

The *Titanic* case, it will be recollected, involved a collision between the steamer *Titanic* and an iceberg on the high seas. Before discussing it, however, we shall refer briefly to the Court's previous decisions on the same general subject.

In *The Scotland*, 105 U. S. 24, the British steamer *Scotland* and the American ship *Kate Dyer* collided on the high seas and both were lost. In a suit by the owners of the *Kate Dyer* against the owners of the *Scotland*, the latter, as a defense, claimed limitation of liability both under the general maritime law and the American statutes. This

Court held that the American limitation law applied and that a foreign ship-owner could claim its benefit. Mr. Justice BRADLEY, after stating what law would be applied if the collision had occurred in foreign waters, said (p. 29):

> "But, if a collision occurs on the high seas, where the law of no particular State has exclusive force but all are equal, any forum called upon to settle the rights of the parties would *prima facie* determine them by its own law as presumptively expressing the rules of justice; but if the contesting vessels belonged to the same foreign nation, the court would assume that they were subject to the law of their nation carried under their common flag, and would determine the controversy accordingly. If they belonged to different nations, having different laws, since it would be unjust to apply the laws of either to the exclusion of the other, the law of the forum, that is, the maritime law as received and practised therein, would properly furnish the rule of decision."

In *The Belgenland*, 5 Sup. Ct. Rep. 860 (114 U. S. 355), the Belgian steamer *Belgenland* and the Norwegian bark *Luna* collided on the high seas and the *Luna* was sunk. The *Luna's* owners libelled the *Belgenland* in the Circuit Court in Pennsylvania and exception was taken to the court's jurisdiction. This Court (BRADLEY, *J.*), sustained the court's jurisdiction and said further (p. 867):

> "As to the law which should be applied in cases between parties or ships of different nationalities, arising on the high seas, not within the jurisdiction of any nation, there can be no doubt that it must be the general maritime law, as understood and administered in the courts of the country in which the litigation is prosecuted."

In *Thommessen and another* v. *Whitwill, (The Great Western)*, 6 Sup. Ct. Rep. 1172 (118 U. S. 520), the British steamer *Great Western* and the Norwegian bark *Daphne* collided on the high seas. The steamer was later stranded and wrecked through careless navigation. In a suit by

the *Daphne's* owners, the owners of the *Great Western* pleaded limitation of their liability under R. S. § 4285. This Court (BRADLEY, *J.*), allowed limitation, saying that the case was properly decided according to the maritime law of the United States, the law of the forum.

In *La Bourgogne*, 210 U. S. 95, the French steamer *La Bourgogne* was sunk in a collision with the British ship *Cromartyshire* off Sable Island. Suits were brought here and the owner of *La Bourgogne* petitioned for limitation of its liability under the United States statutes. This Court (WHITE, *J.*) upheld the petitioner's right to limitation, saying, (p. 116) that the issues were of such a character "as to render it essential that the right to exemption should be tested by the law as administered in the courts of the United States, and not otherwise."

In *The Titanic*, the White Star Line, owner of the *Titanic*, filed a petition for limitation of its liability under United States law. Two claimants excepted to the petition alleging that it failed to show a cause of action for limitation of liability under our law and on the contrary showed that the disaster involved a British vessel on the high seas and therefore the British limitation law applied.

The District Court, *The Titanic*, 209 Fed. 501 (S. D. N. Y.), sustained the exceptions, basing its decision on the statement of Mr. Justice BRADLEY in *The Scotland*, *supra*, that if a collision should occur on the high seas between vessels of the same nationality the law of their flag would be applied in litigation in the United States. The petition accordingly was dismissed with leave to amend.

The Circuit Court of Appeals, *The Titanic*, 209 Fed. 513 (C. C. A. 2), certified three questions to this Court, which were, in substance: (a) whether the ship-owner could maintain the proceeding under R. S. §§ 4283-4285 and the 54th and 56th Rules in Admiralty, if there was no

evidence as to the foreign limitation law; (b) whether the owner could still maintain the proceeding if it appeared that the foreign law provided a different limitation of liability from that of the United States; and (c), if so, whether our Courts would enforce United States law or the foreign law with respect to the amount of the owner's liability.

This Court (HOLMES, *J.*), answering the certificate, said that since the American statute did not undertake to impose liability, but only to limit an existing one, it was a limitation on the remedy, and so was governed by the law of the forum, and that the petition was maintainable under United States law.

Thus (excluding *The Titanic*) there are the two groups of cases, the first involving torts on the high seas where petitions for limitation of liability by foreign ship-owners were held maintainable under American law on the ground that the maritime law, as practised in this country, furnishes the proper rules of decision, and the second involving torts within a foreign jurisdiction, where the *lex loci delicti* was applied, not only as to liability but its measure, extent, and any limitations thereon. Since the case at bar arose out of a collision in Belgian waters it clearly falls within the second group.

The two lines of decisions appear readily reconcilable on the basis of the *locus* of the tort in question, as between the high seas and the territorial limits of a particular sovereignty. Since the high seas are a region "subject to no sovereign", *American Banana Co.* v. *United Fruit Co., supra*, and the law of no country has exclusive force there, *The Scotland, supra*, it is but natural that the maritime law of this country would be applied in litigation here based on torts committed on the high seas. But where the tort has occurred in a foreign jurisdiction we have an entirely different situation. We believe that Mr.

Justice HOLMES himself doubted that the *Titanic* decision would apply to a foreign tort, as shown by his rather casual reference to *The Titanic* in *Western Union Telegraph Company* v. *Brown*, *supra*.

We do not believe that it was necessary for the Court to construe limitation of liability as a remedy in *The Titanic* in order to uphold the White Star Line's petition. With due deference, it seems to us that to have followed the rationale of the previous decisions, such as *The Scotland* and *La Bourgogne*, would have been sufficient.

To conceive of limitation of liability as a remedy leads to curious results. For example, a ship-owner relying on limitation of liability by way of defense, *The Scotland*, *supra*, *The Chickie*, 141 Fed. (2d) 80, 85 (C. C. A. 3), would be pleading a remedy. So would he too if he pleaded the $500 per package limitation of the Carriage of Goods By Sea Act, 46 U. S. C. A. § 1304(5). But we doubt if it would be seriously contended that defenses such as these would be setting up anything other than statutory rights.

Two cases in the lower courts have been cited as holding that limitation of liability is governed by the law of the forum under *The Titanic*, namely, *The Mandu*, 102 Fed. (2d) 459 (C. C. A. 2), and *Royal Mail Steam Packet Co.* v. *Companhia de Navegacao Lloyd Brasileiro*, 31 Fed. (2d). 757 (E. D. N. Y.). But the Court's remarks in *The Mandu* were dictum and in the *Royal Mail* case the state of the record was such that the question was not squarely presented.

Since the soundness of the *Titanic* decision seems open to question, and since it will be argued that it governs this case, we respectfully submit that it be re-examined and either overruled or at least qualified or modified to accord with the decisions in *The Scotland* and *La Bourgogne* and the others previously cited (pp. 17, 18).

POINT III.

The dismissal of this limitation petition presents to this Court for the first time the question as to whether a ship-owner, in the case of a collision in the waters of a foreign country, is entitled to file a petition in a United States court asking that its liability be limited to the amount provided by the law of such foreign nation.

The respondents' exceptions were based on the alleged failure of the petitioner and the United States to transfer their interest in the vessel and her freight to a trustee or to deposit with the court a sum equal thereto or approved security therefor under 46 U. S. C. A. § 185 and the Admiralty Rules of this Court (R. 17, 18). The District Court sustained the exceptions partly for this reason (Order, R. 27; Conclusion of Law, No. 5, R. 27). The United States, however, was not required to post a bond.

The lower Court, although apparently considering the Belgian law to be applicable if its limitation attaches to the right, held, for reasons that are not clear to us, that the petitioner could not invoke that law by petition but could raise it as a defense. The petitioner has in fact pleaded the Belgian limitation law as a defense in its answer to the respondents' libel. But the difficulty is that a concourse of claimants cannot be secured by a defense as it can be by petition.

The Court below also said that the questions raised by the petition could only arise if the petitioner were sued at law, citing *Ex Parte Green*, 286 U. S. 437. We do not see the applicability of the *Green* case. There Green sued Langnes, the owner of the vessel *Aloha*, in the Superior Court of Washington. Langnes then filed a petition

for limitation of liability in the federal court. This Court, in *Langnes* v. *Green*, 282 U. S. 531, had held that the district court should have permitted the action to proceed in the State court, retaining the limitation petition for future action, if necessary. Later Green made an issue in the State court as to the right of Langnes to limitation and this Court, in *Ex Parte Green*, held that if Green pressed the issue it was cognizable only in admiralty, but if he withdrew it the case could remain in the State court. Surely no such situation exists here. The present question is whether the petitioner, aside from having the right to plead the Belgian limitation law as a defense, may rely upon that law by a petition for limitation. We submit that it can.

Article 1 of the Brussels Limitation Convention starts out by limiting the ship-owner's liability to the value of the vessel and her freight (Petition, Art. Twelfth, R. 8, 9), just as our statute does. But the Article contains a proviso which places a limit of £8. per ton on value and, Article 4 defines freight as a lump sum equal to 10% of the vessel's sound value at the beginning of the voyage.

It might be argued that the word "interest" in our statute, construed literally, means the petitioner's entire interest in the vessel and her freight. But if it is held that limitation of liability is governed by the law of Belgium the petitioner's interest for limitation purposes should be $325,028.79, as fixed by the Convention, and a bond for that sum was posted by the petitioner.

We do not see that it does any violence to R. S. § 4285 to take the petitioner's interest in the ship and her freight at the figure arrived at under the Convention's provisions. To do so would simply be to follow the consistent policy adopted by the courts of construing the statute liberally in favor of ship-owners.

In *Coryell* v. *Phipps*, 317 U. S. 406, this Court, referring to the construction of the statute with respect to privity, said (p. 411):

> "That' construction stems from the 'well settled policy to administer the statute not 'with a tight and grudging hand' (Mr. Justice Bradley in *Providence & New York S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 589), but 'broadly and liberally' so as 'to achieve its purpose to encourage investments in shipbuilding and to afford an opportunity for the determination of claims against the vessel and its owner.' *Just* v. *Chambers*, 312 U. S. 383, 385."

See also, *Larsen* v. *Northland Trans. Co.*, 292 U. S. 20, 24.

In *The Scotland*, *supra*, where limitation of liability was pleaded as a defense, objection was made that the ship-owners did not follow the statute by giving up and conveying to a trustee the strippings of the wreck and the pending freight. The Court said (p. 34) that this was not necessary; that where all the parties injured appeared as libellants or intervenors, an answer setting up such a defense gave the ship-owners all the protection they needed; and that it was sufficient to enter a decree against them for the amount of their limited liability and to distribute the sum among the parties entitled to it.

This question now comes before this Court for the first time and because of its far-reaching importance, we respectfully submit that it should be reviewed on certiorari and decided.

POINT IV.

The questions presented are of extreme importance and of unusual interest, not only in the United States but abroad.

The litigation arising out of this collision now embraces two countries, England and the United States, and soon a third country, Belgium, will be involved, as the Belgian Government, we understand, expects to press its claims for the cost of raising the *Merganser* and for damage to the bank of the Schelde River. Therefore, what happens in this case will have repercussions extending to England and the Continent.

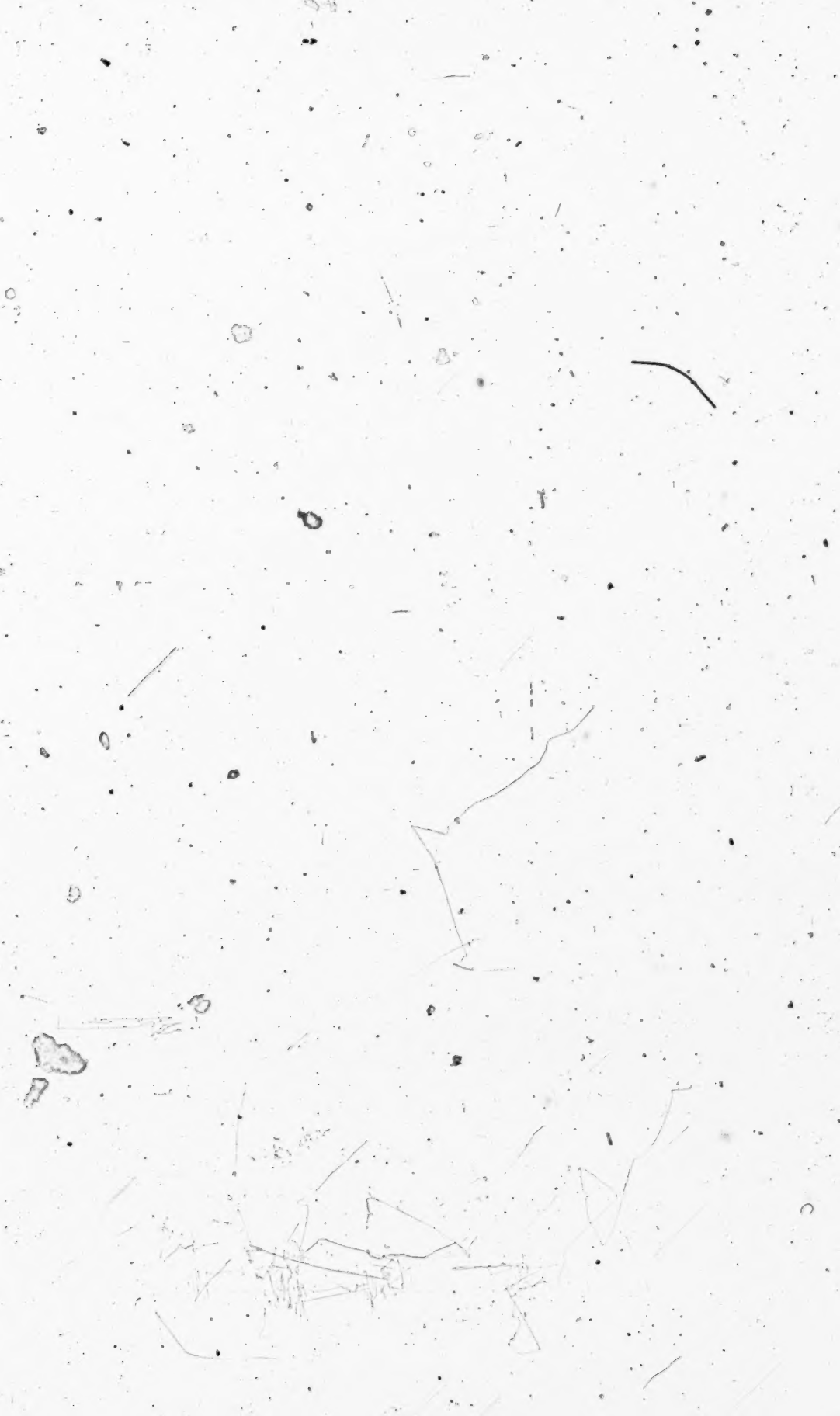
The interesting questions of conflict of laws presented, and the questions relating to R. S. §§ 4283 and 4285, and, above all, the questions relating to the *Titanic* decision, make this an unusually meritorious case for the issuance of a writ of certiorari.

CONCLUSION.

It is respectfully submitted that this petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Second Circuit should be granted.

Dated, June 22, 1948.

JOHN W. CRANDALL,
Counsel for the Petitioner,
Black Diamond Steamship Corp.



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Supreme Court of the United States

OCTOBER TERM—1948

No. 121.

BLACK DIAMOND STEAMSHIP CORP.,
Petitioner,

vs.

ROBERT STEWART & SONS, LTD., *et al.*,
Respondents.

BRIEF FOR THE PETITIONER, BLACK DIAMOND STEAMSHIP CORP.

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INDEX

PAGE

Statement of Facts 1

Convention and Statutes Involved 4

Proceedings in the District Court and the Circuit Court of Appeals and the Decisions of Those Courts Therein 4

1. The District Court 4

2. The Circuit Court of Appeals 5

Jurisdiction 6

Specifications of Error 7

The Questions Presented 8

Summary of Argument 9

POINT I—The collision having taken place in the Schelde River, Belgium, the petitioners should be held entitled to have their liability, if any, limited in accordance with the limitation of liability law of Belgium 10

POINT II—The facts of the *Titanic* case make it distinguishable, we believe, from the case at bar. If, however, the rule stated therein is broad enough to include a case such as this one the decision should be re-examined, we submit, and modified to accord with the other decisions of this Court in analogous situations, or overruled 18

POINT III—If the Court finds that the law of Belgium as to limitation of liability is the applicable one, the petitioners, we submit, should be held entitled to claim the benefit of that law by petition 27

PAGE

Point IV—The reasons given by the lower Court for affirming the District Court's order of dismissal, have, it is believed, no application to this case 29

Point V—A denial of the benefits of the Belgian limitation of liability law to the petitioners would lead to the anomalous result of depriving Black Diamond of any real limitation of liability at all 32

Conclusion 36

Appendix A 37

Appendix B 39

Table of Authorities Cited.

Cases.

American Banana Co. v. United Fruit Co., 213 U. S. 347 ..... 8, 9, 12, 22

Aquitania, The, 20 Fed. (2d) 457 (C. C. A. 2) 7, 30

Belgenland, The, 5 Sup. Ct. Rep. 860 (114 U. S. 355) 9, 19, 26

Bourgogne, La, 210 U. S. 95 ..... 9, 20, 21, 22, 23, 25, 26

Chelentis v. Luckenbach S.S. Co., 247 U. S. 372 24

Chickie, The, 141 Fed. (2d) 80 (C. C. A. 3) 23

Coryell v. Phipps, 317 U. S. 406 28

Cuba Railroad Company v. Crosby, 222 U. S. 473 ..... 8, 11

Curtis Bay Towing Co. v. Tug Kevin Moran, 159 Fed. (2d) 273 (C. C. A. 2) 7, 30

Eagle Point, The, 142 Fed. 453 (C. C. A. 3) 21

George W. Fields, The, 237 Fed. 403 (S. D. N. Y.) 7, 30

Green, Ex Parte, 286 U. S. 437 31

Hahlo v. Benedict, 216 Fed. 303 (C. C. A. 2) 32

PAGE

Herrick v. Railroad Co., 31 Minn. 11 10
Hill v. Audus (1855), 24 L. J. Ch. 229 33

Langes v. Green, 282 U. S. 531 31
Larsen v. Northland Trans. Co., 292 U. S. 20 29
Lauria v. E. I. Du Pont de Nemours & Co., Inc., 241 Fed. 687 (E. D. N. Y.) 16
Leary v. United States, 14 Wall. 607 32
Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397 2

Mandu, The, 102 Fed. (2d) 459 (C. C. A. 2) 15, 24
Mandu, The, 114 Fed. (2d) 361 (C. C. A. 2) 16, 24
Mosby v. Manhattan Oil Co., 52 Fed. (2d) 364 (C. C. A. 8) 14, 18

Northern Pacific R. Co. v. Babcock, 14 Sup. Ct. Rep. 978 (154 U. S. 190) 8, 10, 24

Oceanic Steam Navigation Company, Limited v. Mellor (The Titanic), 233 U. S. 718 ..... 5, 16, 18, 20, 22, 23, 24, 25, 26, 28

Royal Mail Steam Packet Co. v. Companhia de Navegacao Lloyd Brasileiro, 31 Fed. (2d) 757 (E. D. N. Y.) 5, 24, 25

Scotland, The, 105 U. S. 24 ..... 9, 12, 18, 21, 22, 23, 25, 26, 29
Shapleigh v. Mier, 83 Fed. (2d) 673 (C. C. A. 5) 2
Slater v. Mexican National R. R. Co., 194 U. S. 120 ..... 8, 11, 18
Smith v. Condry, 1 Howard 28 16
Suspine, et al. v. Compania Transatlantica Centro-americana, S. A., et al., 37 Fed. Supp. 263 (S. D. N. Y.) 2

Talbot v. Seeman, 1 Cranch. 1 2
Suspine et al. v. Compania Transatlantica Centro-Thommessen and another v. Whitwill (The Great Western), 6 Sup. Ct. Rep. 1172 (118 U. S. 520) 9, 20, 23, 26

PAGE

Titanic, The, 209 Fed. 501 (S. D. N. Y.) 21, 23, 28
Titanic, The, 209 Fed. 513 (C. C. A. 2) 21

United States, et al. v. Robert Stewart & Sons, Limited, et al., 167 Fed. (2d) 308 (C. C. A. 2) 5
United States Navigation Co., Inc. v. Black Diamond Lines, Inc., 37 Fed. Supp. 1005 (S. D. N. Y.) 2

Western Union Telegraph Company v. Brown, 234 U. S. 542 ..... 9, 13, 18, 22

CONVENTIONS AND STATUTES.

Brussels Limitation Convention 2, 3, 4, 7, 8, 27, 28, 31

Brussels Collision Convention 15, 24

Judicial Code, Section 240(a), as amended by the Act of February 13, 1925, 28 U. S. C. A. § 347(a) 6

R. S. 4283 ..... 4, 23

R. S. 4285 ..... 4, 7, 8, 9, 20, 23, 28

46 U. S. C. A. §§ 181-188 ..... 4, 5

46 U. S. C. A. § 185 ..... 4, 5, 8, 23, 27

Carriage of Goods by Sea Act, 46 U. S. C. A. § 1304(5) 24

RULES OF THE SUPREME COURT.

Rules 51-54, 28 U. S. C. A. § 723 ..... 4, 8, 23, 27

TEXTBOOKS.

Benedict on Admiralty, Sixth Edition, Vol. 6, pp. 88-91 4

Bouvier's Law Dictionary 24

Supreme Court of the United States

OCTOBER TERM—1948

No. 121.

BLACK DIAMOND STEAMSHIP CORP.,

Petitioner,

vs.

ROBERT STEWART & SONS, LTD., *et al.*,

Respondents.

BRIEF FOR THE PETITIONER, BLACK DIAMOND STEAMSHIP CORP.

This case is before the Court on writs of certiorari granted October 11, 1948, on separate petitions of Black Diamond Steamship Corp., (No. 121) and the United States of America (No. 130) (R. 29) (The petitioners, for brevity, will be called "Black Diamond" and "United States" whenever it becomes necessary to distinguish between them). The decree under review is that of the United States Circuit Court of Appeals for the Second Circuit, dated March 29, 1948 (R. 28) affirming an order of the United States District Court for the Eastern District of New York, which sustained the exceptions of the respondents to the petitioners' petition for limitation of liability and dismissed the petition. (R. 14, 15).

Statement of Facts.

The case at bar arises out of a collision between the American steamer *Norwalk Victory*, of which the United States is the owner and Black Diamond the bareboat char-

terer, and the British steamer *Merganser*, in the Schelde River, Belgium, on April 28, 1947. The *Merganser* was sunk and the respondents, owners of cargo which went down with her, sued the petitioners in the United States District Court for the Eastern District of New York, demanding damages amounting to $1,000,000. (Petition, Art. Seventh, R. 5, 6).

Thereafter the petitioners, within the six-months statutory period, filed this petition for the limitation of their liability under the law of Belgium, which is the International Convention for the Unification of Certain Rules of Law Relating to the Limitation of Liability of Owners of Seagoing Vessels (Appendix A, *infra* pp. 37, 38). This Convention, which we shall refer to as the Brussels Limitation Convention, was signed at Brussels on August 25, 1924, was ratified by Belgium on June 2, 1930, and first took effect on June 2, 1931 (Petition, Art. Eleventh, R. 6).

Since the respondents' exceptions perform the function of a demurrer, all well pleaded allegations of fact in the limitation petition stand as admitted for the purpose of the exceptions. *Suspine et al.* v. *Compania Transatlantica Centroamericana, S. A., et al.*, 37 Fed. Supp. 263, 264 (S. D. N. Y.); *United States Navigation Co., Inc.* v. *Black Diamond Lines, Inc.*, 37 Fed. Supp. 1005 (S. D. N. Y.). This admission includes the allegations regarding the law of Belgium, which, being foreign law, is of course a matter of fact. *Talbot* v. *Seeman*, 1 Cranch, 1; *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 445; and *Shapleigh* v. *Mier*, 83 Fed. (2d) 673, 676 (C. C. A. 5).

The facts alleged in the limitation petition, so far as relevant to the case, are these:

The *Norwalk Victory*, when the collision occurred, was engaged on a voyage from New York to Antwerp, Belgium, and Rotterdam, The Netherlands. She left Antwerp for Rotterdam at 7:50 P. M., on April 28, 1947, with some 1150

tons of cargo aboard. While proceeding down the Schelde River she collided with the British steamer *Merganser* at 11:45 P. M., near Lille, Belgium. The *Merganser* was sunk and her chief steward was killed.

Shortly afterward British and Continental S. S. Co. Ltd., owner of the *Merganser*, sued Black Diamond in the High Court of Justice of England, Probate, Divorce and Admiralty Division, for the loss of the vessel. In that suit Black Diamond was required to post bail in pounds sterling equivalent to $1,000,000.

About six months later the present suit was brought against the petitioners in this country (Petition, Arts. Fifth and Seventh, R. 2-6; Findings of Fact Nos. 5-9; R. 16, 17).

Article 1 of the Brussels Limitation Convention limits the liability of the owners of a seagoing vessel to an amount equal to her value, freight and accessories with respect to compensation due to third parties because of damage caused by the faults of the master, crew or pilot of the vessel, provided, however, that such liability shall not exceed an aggregate sum equal to £8. per ton of the vessel's tonnage. Article 4 defines the freight as a lump sum fixed at 10% of the vessel's value at the commencement of the voyage. Article 7 provides for an additional payment of £8. per ton in the case of death or personal injury. Article 10 makes the Convention applicable to an operator or charterer who is liable under Article 1 or Article 7. Article 11 provides for the calculation of tonnage, which is net tonnage plus the amount deducted from the gross tonnage on account of engine room space to ascertain the net tonnage (Petition, Arts. Tenth-Twelfth; R. 6-8; Findings of Fact Nos. 11-17, R. 17, 18).

On the basis of the *Norwalk Victory's* tonnage, calculated as provided in the Convention, plus $100,000, or 10% of her sound value at the commencement of the voyage, the

limitation of the petitioners' liability for property damage under the Convention is $325,028.79. The United States, as a corporation sovereign, was of course not required to give a bond. Black Diamond, however, posted a surety bond for $325,028.79. (Petition, Art. Thirteenth, R. 8; Findings of Fact Nos. 18-21, R. 18; Bond, R. 10-12).

Convention and Statutes Involved.

The relevant provisions of the Brussels Limitation Convention are set forth in Appendix A, *infra* pp. 37, 38. The full text of the Convention will be found in Benedict on Admiralty, Sixth Edition, Vol. 6, pp. 88-91. R. S. 4283(a) and R. S. 4285 are set forth in Appendix B, *infra* p. 39.

Proceedings in the District Court and the Circuit Court of Appeals and the Decisions of Those Courts Therein.

1. The District Court:

The respondents excepted to the petition on these grounds: (a) In that the allegations of the petition were insufficient to give the Court jurisdiction of the proceeding because the petitioners failed to comply with the United States limitation of liability statute, 46 U. S. C. A. Chapter 8; (b) because the petitioners did not deposit with the Court a sum, or approved security therefor, equal to the amount of value of their interests in the vessel and her pending freight, nor did they transfer such interests to a trustee, as required by 46 U. S. C. A. § 185; (c) because the petitioners did not comply with Admiralty Rules 51-54 of this Court, 28 U. S. C. A. § 723; and (d) because the petitioners did not comply with Admiralty Rules 31-35 of the District Court (R. 12, 13).

The District Court, in sustaining the exceptions and dismissing the petition, relied on the authority of *Oceanic Steam Navigation Company, Limited* v. *Mellor (The Titanic)*, 233 U. S. 718, and *Royal Mail Steam Packet Co.* v. *Companhia de Navegacao Lloyd Brasileiro*, 31 Fed. (2d) 757 (E. D. N. Y.). It held that a ship-owner's right to limit its liability in a United States Court is derived exclusively from the United States limitation of liability statute, 46 U. S. C. A. §§ 181-188; that this statute does not impose a liability but only limits an existing liability, and so does not relate to the substantive right but to the remedy, which is governed by the law of the forum; that it is a jurisdictional requirement under 46 U. S. C. A. § 185, that a sum, or approved security therefor, be deposited with the Court for the benefit of the damage claimants equal to the value of the ship-owner's interest in the vessel and her freight, and that the petitioners had not met this requirement. The Court held, finally, that the fact that the collision took place in Belgian waters did not affect the principles stated (R. 14, 15). Supplementing its order of dismissal, the Court made Findings of Fact and Conclusions of Law (R. 16-19). It rendered no formal written opinion, its decision being incorporated in its order and Conclusions of Law. The decision has not been reported.

2. The Circuit Court of Appeals:

The Circuit Court of Appeals, *United States et al.* v. *Robert Stewart & Sons, Ltd. et al.*, 167 Fed. (2d) 308 (C. C. A. 2) said that if the petitioners had alleged that the limitation of liability provided by the Brussels Limitation Convention meant that the limit attached to the right, it would have been conclusive upon the exceptions. Nevertheless, it said that it would read the petition as favorably as possible to the petitioners and construe it to mean that the Belgian law did attach the limit to the right. It said further that it did not understand the *Titanic* de-

cision as meaning that the Court would refuse to recognize limits imposed upon a ship-owner's liability by foreign nations, which were attached to the right. The Court said, however, that it was unnecessary to pass upon the question as to whether the petitioners were required to post a bond for a larger sum than that required by the Belgian law because they were in this inescapable dilemma: If the limit of their liabilities is $325,000. and the *Norwalk Victory* is worth $1,000,000. they had no right to institute proceedings for limitation of their liability but were confined to asserting their privilege as a defense to suits brought against them. If, on the other hand, the liabilities might exceed $325,000., the bond posted was too small. The Court said further that the question presented could not arise unless the petitioners were sued at law, and that if a claimant in an action at law should deny their right to limit liability, the issues so raised would be justiciable only in admiralty, where it then might be necessary to decide whether the bond should go beyond the amount of liability. It said, in conclusion, that the right to limit could be tried in the pending admiralty suit, in which, if the claimants defeated the right, obviously the proceeding would not be proper, whereas if the claimants were unsuccessful the same reasons would forbid the proceeding as do at present (R. 25-27).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. A. § 347(a).

Specifications of Error.

Black Diamond, in its petition for a writ of certiorari, alleged that the Circuit Court of Appeals made the following errors:

1. In affirming the order of the District Court dismissing the petition for limitation of liability.

2. In failing to hold that this petition was properly filed under R. S. § 4285; 46 U. S. C. A. § 185.

3. In failing to hold that since the collision occurred within the territorial waters of Belgium, the limitation of liability provided by the Brussels Limitation Convention applies.

4. In failing to hold that limitation of a ship-owner's liability is a matter of right which is governed by the *lex loci delicti.*

5. In failing to hold that the limitation of liability provided by the Brussels Limitation Convention is a limitation attaching to the respondents' rights and measures the extent of their recoveries against the petitioners.

6. In failing to hold that Black Diamond's interest in the *Norwalk Victory* for the purpose of limitation of liability in the case of property damage is $325,028.79, under the Brussels Limitation Convention, and that the posting of a bond for that amount by Black Diamond was sufficient compliance with R. S. § 4285.

7. In holding this case to be within the rule applied in *The Aquitania*, 20 Fed. (2d) 457 (C. C. A. 2), *Curtis Bay Towing Co.* v. *Tug Kevin Moran*, 159 Fed. (2d) 273 (C. C. A. 2), and *The George W. Fields*, 237 Fed. 403 (S. D. N. Y.).

8. In holding that the question presented by this petition could not arise unless the petitioners were sued at law.

The Questions Presented.

1. In the case of a collision between an American vessel and a British vessel in the waters of Belgium, where a suit for damages based thereon has been brought in a United States Court, is limitation of the ship-owner's liability, as distinguished from the means employed to secure such limitation, determined by the law of Belgium or that of the United States?

2. Is the limitation of a ship-owner's liability, as distinguished from the modes of procedure used to secure it, a matter of right or a matter of remedy?

3. Is the limitation of a ship-owner's liability provided by the Brussels Limitation Convention a limitation attached to the right?

4. If limitation of the petitioners' liability is determined by the law of Belgium, are the petitioners restricted to pleading the Belgian limitation law as a defense in a suit against them or can they also invoke such law by a petition for limitation of liability under R. S. § 4285, 46 U. S. C. A. § 185, and the Admiralty Rules of this Court?

5. In a limitation of liability proceeding filed under R. S. § 4285, wherein the petitioners invoke the limitation of liability law of Belgium, would not the amount of their interest in the vessel and her freight be that fixed by the Belgian law rather than the law of the United States?

6. Is the *Titanic* decision, holding that limitation of liability is a limitation on the remedy, which is governed by the law of the forum, in harmony with this Court's decisions in *Northern Pacific R. Co.* v. *Babcock*, 14 Sup. Ct. Rep. 978 (154 U. S. 190), *Slater* v. *Mexican National R. R. Co.*, 194 U. S. 120, *Cuba Railroad Company* v. *Crosby*, 222 U. S. 473, *American Banana Co.* v. *United Fruit Co.*, 213

U. S. 347, and *Western Union Telegraph Company* v. *Brown*, 234 U. S. 542?

7. Does the *Titanic* decision accord with the rule on conflict of laws applied by this Court in *The Scotland*, 105 U. S. 24, *The Belgenland*, 5 Sup. Ct. Rep. 860 (114 U. S. 355), *Thommessen and another* v. *Whitwill (The Great Western)*, 6 Sup. Ct. Rep. 1172 (118 U. S. 520), and *La Bourgogne*, 210 U. S. 95, and, if not, should it not be modified accordingly, or overruled?

8. Is not the *Titanic* case in any event distinguishable from this one on the ground that there the disaster occurred on the high seas, whereas here the collision occurred in foreign territorial waters?

9. Were the reasons given by the lower Court for affirming the District Court's order of dismissal valid?

Summary of Argument.

Black Diamond's contentions are these: (1) That since the collision between the *Norwalk Victory* and the *Merganser* occurred within the territorial waters of Belgium, the Belgian law as to the limitation of a ship-owner's liability should be applied and held to measure the extent of the petitioners' liability to the respondents (Point I, pp. 10-18). That the *Titanic* case is distinguishable from this one and that in any event that decision should be re-examined to determine its soundness, in the light of other decisions of this Court in analogous cases (Point II, pp. 18-26). That the petitioners should be held entitled to invoke the Belgian limitation law by petition, under R. S. § 4285, instead of being remitted to pleading that law as a defense in their answer to the respondents' libel, which would make it impossible for them to secure a concourse of claimants (Point III, pp. 27-29). That the reasons given by the lower Court for its affirmance of the District

Court's order are inapplicable to this case (Point IV, pp. 29-31). Finally, that the interests of justice dictate that the Belgian limitation law be applied, for to hold otherwise would lead to the anomalous result of depriving Black Diamond of any effective limitation of liability at all (Point V, pp. 32-35).

POINT I.

The collision having taken place in the Schelde River, Belgium, the petitioners should be held entitled to have their liability, if any, limited in accordance with the limitation of liability law of Belgium.

Under the doctrine of conflict of laws repeatedly applied by this Court, (with the possible lone exception of *The Titanic*) as well as by the lower federal courts, it seems clear that limitation of liability, in the case of a tort occurring within a foreign jurisdiction, is determined by the *lex loci delicti*.

In *Northern Pac. R. Co.* v. *Babcock*, 14 Sup. Ct. Rep. 978 (154 U. S. 190), the plaintiff, as administrator, sued in a Federal Court in Minnesota to recover damages for the death of the decedent, Munro, a Northern Pacific engineer. Munro was killed in Montana, which had no limit on the amount recoverable in a death case. In Minnesota, however, the limit of recovery for death at the time Munro was killed was $5,000. and $10,000. when the case was tried. The jury awarded the plaintiff $10,000.

This Court (WHITE, *J.*) stated that the first question presented was whether the amount of damages was to be controlled by the law of the place of employment and where the accident occurred or by the law of the forum. After referring to the case of *Herrick* v. *Railroad Co.*, 31 Minn. 11, it held (p. 981) that the District Court committed no

error in holding that the right to recover was governed by the *lex loci* and not by the *lex fori*.

In *Slater v. Mexican National R. R. Co.*, 194 U. S. 120, suit was brought in the United States Circuit Court in Texas to recover damages for the death in Mexico of the decedent, a switchman on the defendant railroad.

Under the Mexican law a decree for damages in a death case was analogous to one for alimony, contemplating periodical payments and being subject to modification from time to time. The Court and jury, however, fixed the recovery in a lump sum under the Texas statute.

This Court (HOLMES, *J.*) said (p. 126):

> "The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person and may be enforced wherever the person may be found. * * * But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, *Smith* v. *Condry*, 1 How. 28, but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, *and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose.* * * * Therefore we may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught." (Italics ours.)

In *Cuba Railroad Company* v. *Crosby*, 222 U. S. 473, the plaintiff, who had lost his hand in an accident in Cuba through a defect in the machinery of a planing mill, sued the defendant in the United States Circuit Court for the

District of New Jersey. The plaintiff noticed the defect and reported it and testified that the employer told him that it would be repaired and that in the meantime he was to go on with his work. The Court instructed the jury that if these were the facts the defendant had assumed the risk for a reasonable time. There was no evidence as to what the law of Cuba was but the trial Court said that in the absence of proof by the defendant that it differed from the *lex fori* the latter would be applied.

A judgment for the plaintiff was reversed by this Court. Mr. Justice HOLMES, after referring to certain classes of rudimentary contracts or torts, as to which all civilized countries might impose an obligation, said (p. 478):

> "But when an action is brought upon a cause arising outside of the jurisdiction it always should be borne in mind that the duty of the court is not to administer its notion of justice but to enforce an obligation that has been created by a different law. * * * The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there. With very rare exceptions the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. * * * That and that alone is the foundation of their rights."

Also (p. 479):

> "The extension of the hospitality of our courts to foreign suitors must not be made a cover for injustice to the defendants of whom they happen to be able to lay hold."

The Court (p. 478) referred to *The Scotland, infra,* as being an exceptional case.

In *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, the suit was to recover three-fold damages under the Act to Protect Trade against Monopolies. The alleged

wrongful acts, however, took place in Costa Rica. This Court (HOLMES, *J.*) said (p. 355):

> "It is obvious that, however stated, the plaintiff's case depends on several rather startling propositions. In the first place the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other states. It is surprising to hear it argued that they were governed by the act of Congress.
>
> No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such countries may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive."

Also (p. 356):

> "But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. • • • For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign contrary to the comity of nations, which the other state concerned justly might resent."

In *Western Union Telegraph Company* v. *Brown*, 234 U. S. 542, a telegram was despatched from South Carolina to the plaintiff in Washington, D. C. notifying her of her sister's death. Delivery was negligently delayed in Washington, causing the plaintiff to miss the funeral. She sued in a South Carolina State Court under the South Carolina Civil Code, alleging mental anguish and consequent damages. A recovery was allowed under that Code, regardless of the law of Washington.

This Court reversed the judgment, Mr. Justice HOLMES saying (pp. 546, 547):

> "Whatever variations of opinion and practice there may have been, it is established as the law of this court that when a person recovers in one jurisdiction for a tort committed in another he does so on the ground of an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere, and that is not only the ground *but the measure of the maximum recovery. Slater v. Mexican National R. R. Co.*, 194 U. S. 120, 126. *Cuba R. R. Co. v. Crosby*, 222 U. S. 473, 478, 480. (A limitation of liability *may* stand on different grounds, *The Titanic*, 233 U. S. 718). The injustice of imposing a greater liability than that created by the law governing the conduct of the parties at the time of the act or omission complained of is obvious; and when a State attempts in this manner to affect conduct outside its jurisdiction or the consequences of such conduct, and to infringe upon the power of the United States, it must fail." (Italics ours).

In *Mosby v. Manhattan Oil Co.*, 52 Fed. (2d) 364 (C. C. A. 8), the plaintiff, owner of a ranch in Kansas, sued the defendants in the federal court in Missouri for damages resulting from a nuisance created and maintained by the defendants. The defendants were engaged in oil drilling and producing operations on higher land adjacent to the ranch, and as a consequence salt water and crude oil escaped from the wells and settled on the plaintiff's land and also permeated the water in a stream passing through it, rendering the land unfit for cattle raising.

The defendants moved for a directed verdict on the ground of a misjoinder of parties and causes of action, they having been acting independently and not concurrently or jointly in the matter. Under the law of Kansas they could be sued jointly, but not under the law of

Missouri. The trial Judge held that the law of the forum applied and granted the motion.

The Circuit Court of Appeals reversed the judgment, saying (p. 367):

> "The correctness of the ruling that the law of Missouri governs is challenged, and raises the main question on this appeal. The answer to the question depends upon whether the matter involved is one of substantive law or procedural law. It is to be noted that, under the Kansas cases, recovery may be had against each defendant for the full amount of the damages suffered; whereas under the Missouri cases recovery may be had against each defendant only to the extent of the injuries inflicted by his own wrong. We think the difference is more than a procedural one; it goes to the extent or scope of the cause of action. The measure of the damages which plaintiff has sustained may be the same in Missouri as in Kansas; but the extent of the liability of each defendant is quite different in the two states. We think the difference is one of substantive right."

Was the law of Missouri, as compared with the law of Kansas, anything but a limitation of the liability of the individual defendants? It seems obvious that it was.

The lower Court has itself followed the same rule. In *The Mandu*, 102 Fed. (2d) 459 (C. C. A. 2), the Brazilian steamer *Mandu* and the German steamer *Denderah* collided in Brazilian waters. The *Denderah* was sunk, and the owner of the *Mandu* petitioned for limitation of its liability.

One of the main points involved was whether or not liability for the collision should be determined according to the Brussels Collision Convention of 1910, which was in force in Brazil. The Court held that it should, saying (p. 463):

> "Liability for tort caused by collision in the territorial waters of a foreign country is governed

by the laws of that country. Smith v. Condry, 1 How. 28, 11 L. Ed. 35; Restatement of Conflict of Laws, section 409. That law not only determines the existence of the liability but also generally determines the measure of it."

When the case came up on the merits, *The Mandu*, 114 Fed. (2d) 361 (C. C. A. 2) the Court found the vessels at fault in unequal degrees, charging four-fifths of the damages to the *Denderah* and one-fifth to the *Mandu*.

What the Court actually did was place a limitation on the *Mandu's* liability to cargo, for under the American rule she would have been liable in full to the cargo-owners, with the right of recoupment or set-off against the *Denderah's* owners. That the reduction of 80% in cargo's recovery against the *Mandu* under the Convention was really a limitation of the ship's liability was recognized by the Court when, after citing *The Titanic*, it said (p. 463) that the vessel's right "further to limit liability" would be governed by United States law.

The fact that the vessels concerned in the *Mandu* case belonged to countries which were signatories to the Brussels Collision Convention, whereas the United States has not adhered to that Convention, is, we believe, of no significance. If liability for tort is determined by the *lex loci delicti* the nationality of the colliding vessels should be wholly immaterial. The Brussels Collision Convention is the law of Belgium whether this Country has adhered to the Convention or not. In *Smith* v. *Condry*, 1 Howard 28, where two American vessels collided in the port of Liverpool, this Court (TANEY, *C. J.*) held that the question of liability must be determined by the law of England.

In *Lauria* v. *E. I. Du Pont de Nemours & Co., Inc.*, 241 Fed. 687 (E. D. N. Y.), the decedent was killed in Virginia while operating an electric car at the defendant's plant.

Suit for his death was brought under the Virginia Death Statute in the United States District Court for the Eastern District of New York. A motion was made to dismiss the complaint on the ground that the Virginia Statute was so unlike the statutory right of action prevailing in New York that the action should not be entertained. The motion was denied, the Court stating (p. 693):

> "The defendant has cited and relied upon the statement made in Wooden v. W. N. Y. & P. R. R. Co., 126 N. Y. 10, * * * that the extent of damages pertains to the remedy rather than to the substantive right. Since, upon that theory, this action might be maintainable for such damages as would be recoverable under the law of New York, although not maintainable for such damages as the Virginia statute allows, it is necessary that I should make it plain, for the purpose of this motion, that I proceed on no such theory. I adopt to its full extent what I conceive to be the true principle, that the measure, elements, and extent of the damages given by the law of the state in which the action arose pertain to the substance of the right, not to the remedy, and that the question of its enforcement in another jurisdiction must be determined with respect to the right as given. The principle was clearly formulated by Mr. Justice Holmes in Slater v. Mexican National R. R. Co., 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900. When a liability is enforced in a jurisdiction foreign to the place of the wrongful act, that does not mean that the act is in any degree subject to the lex fori with regard either to its quality or its consequences. Inasmuch as the only source of the obligation is the law of the place of the act, that law must determine its extent. Therefore it is quite inadmissible to resort to the law of the place of the act so far as to show that the act was a tort, and then to determine the consequences according to the accident of the place where the defendant may happen to be found."

Where, therefore, a tort has occurred within the territorial limits of a foreign country, as here, we can see no

escape from the conclusion that the limitation of liability law of that country must control, because it determines the extent of the liability, *Slater* v. *Mexican National R. R. Co., supra,* it is the measure of the maximum recovery, *Western Union Telegraph Co.* v. *Brown, supra,* and it goes to the extent or scope of the cause of action. *Mosby* v. *Manhattan Oil Co., supra.*

POINT II.

The facts of the *Titanic* case make it distinguishable, we believe, from the case at bar. If, however, the rule stated therein is broad enough to include a case such as this one the decision should be re-examined, we submit, and modified to accord with the other decisions of this Court in analogous situations, or overruled.

We did not assign error to the lower Court's interpretation of the *Titanic* decision because it was in our favor; certainly it was not against us. (R. 26). But since the District Court dismissed the petition on the authority of *The Titanic* (R. 14, 15) and because the respondents' counsel will undoubtedly contend that the order should have been affirmed on that ground, a consideration of *The Titanic,* together with four prior decisions of this Court, becomes necessary.

The *Titanic,* it will be recalled, involved a collision between the steamer *Titanic* and an iceberg on the high seas, resulting in great loss of life. But before discussing that decision we shall refer to the earlier ones.

In *The Scotland,* 105 U. S. 24, the British steamer *Scotland* and the American ship *Kate Dyer* collided on the high seas and both were lost. In a suit by the owners of the *Kate Dyer* against the owners of the *Scotland,* the

latter, as a defense, claimed limitation of liability, both under the general maritime law and the American statutes. This Court held that the American limitation law applied and that a foreign ship-owner could claim its benefit. Mr. Justice BRADLEY, after stating the law that would be applied if the collision had occurred in foreign waters, said (p. 29):

> "But, if a collision occurs on the high seas, where the law of no particular State has exclusive force but all are equal, any forum called upon to settle the rights of the parties would prima facie determine them by its own law as presumptively expressing the rules of justice; but if the contesting vessels belonged to the same foreign nation, the court would assume that they were subject to the law of their nation carried under their common flag, and would determine the controversy accordingly. If they belonged to different nations, having different laws, since it would be unjust to apply the laws of either to the exclusion of the other, the law of the forum, that is, the maritime law as received and practised therein, would properly furnish the rule of decision."

In *The Belgenland*, 5 Sup. Ct. Rep. 860 (114 U. S. 355), the Belgian steamer *Belgenland* and the Norwegian bark *Luna* collided on the high seas and the *Luna* was sunk. The *Luna's* owners then libelled the *Belgenland* in the Circuit Court in Pennsylvania and the steamer's proctor excepted to the Court's jurisdiction.

This Court (BRADLEY, *J.*), sustained the lower Court's decision as to jurisdiction and with respect to the applicable law, said (p. 867):

> "As to the law which should be applied in cases between parties or ships of different nationalities, arising on the high seas, not within the jurisdiction of any nation, there can be no doubt that it must be the general maritime law, as understood and administered in the courts of the country in which the litigation is prosecuted."

In *Thommessen and another* v. *Whitwill, (The Great Western)*, 118 U. S. 520, the British steamer *Great Western* and the Norwegian bark *Daphne* collided on the high seas. The steamer was later stranded and wrecked through careless navigation. In a suit by the *Daphne's* owners, the owners of the *Great Western* pleaded limitation of their liability under R. S. § 4285. This Court (BRADLEY, J.), allowed limitation, saying that the case was properly decided according to the maritime law of the United States, the law of the forum.

In *La Bourgogne*, 210 U. S. 95, the French steamer *La Bourgogne* was sunk in a collision with the British ship *Cromartyshire* off Sable Island. Numerous suits were brought in various courts in the United States, following which the owner of *La Bourgogne* petitioned for limitation if its liability under the United States statutes in the Federal Court for the Southern District of New York.

The petitioner's right to limitation was upheld and Mr. Justice WHITE, speaking for this Court, said (p. 116):

> "As the petitioner called the various claimants into a court of admiralty of the United States to test whether, in virtue of the laws of the United States, it should be relieved in part at least of liability from the consequences of the acts of its agents, and, as the international rules have the force of a statute, we think the issues presented were of such a character as to render it essential that the right to exemption should be tested by the law as administered in the courts of the United States, and not otherwise."

This brings us to *The Titanic*. There, the White Star Line, owner of the *Titanic*, filed a petition in the Federal Court for the Southern District of New York, asking for limitation of its liability under United States law. Exceptions to the petition were filed because; (1), it did not state facts sufficient to show a cause of action for limitation of

liability under our law; and (2), it showed that the acts on which the claim was based took place aboard a British vessel on the high seas and therefore the British law as to limitation of liability would apply.

The District Court, after a lengthy review of the cases, sustained the exceptions. *The Titanic*, 209 Fed. 501 (S. D. N. Y.). It based its decision largely on the statement of Mr. Justice BRADLEY in *The Scotland, supra*, that if a collision should occur in British waters, at least between British vessels, or on the high seas between vessels of the same nationality, the law of the vessels' flag would be applied in litigation in this country. It also relied on *The Eagle Point*, 142 Fed. 453 (C. C. A. 3) which involved a collision between two British vessels on the high seas, and where the Court held that the law of England limiting the recovery which could be had by cargo against either or both ships was controlling. The Court thought that the *Titanic* disaster, involving as it did a collision between a British ship and an iceberg, fell within the exception stated by Mr. Justice BRADLEY in *The Scotland*, rather than within *The Scotland* and *La Bourgogne* decisions. The petition accordingly was dismissed with leave to the petitioner to amend.

On appeal, the Circuit Court of Appeals, *The Titanic*, 209 Fed. 513 (C. C. A. 2), certified three questions to this Court; (a) whether under the circumstances presented and where nothing appeared as to the law of the vessel's country touching her owner's liability, the owner could maintain a proceeding under R. S. §§ 4283-4285 and the 54th and 56th Rules in Admiralty; (b) whether the owner could maintain such a proceeding in the United States courts under such statutes and rules even though it appeared that the law of the vessel's country provided a different limitation of liability from that prescribed in the United States; and (c), if the answer to (b) was "yes", whether the courts of the United States would enforce

United States law or the law of the foreign country with respect to the amount of the owner's liability.

This Court, Mr. Justice HOLMES delivering the opinion, after citing *The Scotland* and *La Bourgogne*, said that since the American statute did not undertake to impose liability, but only to limit an existing one, it was a limitation on the remedy, and therefore was governed by the law of the forum. The Court accordingly answered questions (a) and (b) in the affirmative, and in answer to question (c) said that the law of the United States would be enforced.

Thus there are the two lines of cases, those cited in our first point, involving torts within a foreign jurisdiction, where the *lex loci delicti* was applied, not only as to liability, but its measure, extent, and any limitations thereon, and those cited in this point, involving torts on the high seas, where petitions for limitation of liability by foreign shipowners were held maintainable under United States law, the reason given, in all the cases but *The Titanic*, being that under the circumstances the maritime law of this country furnished the proper rules of decision. Since the present collision occurred in Belgian waters, this case, it seems to us, clearly falls within the first group and not the second.

There is a rational basis, we think, for resolving these two lines of decisions. It is the *locus* of the tort, as between the high seas and the limits of a particular sovereignty. Mr. Justice HOLMES himself seemingly was mindful that there is such a distinction, as evidenced by his reference, in *American Banana Co.* v. *United Fruit Co.*, *supra*, to the high seas as a region "subject to no sovereign." Evidently he doubted whether the *Titanic* decision would apply to a tort committed in a foreign country, for when holding in *Western Union Telegraph Company* v. *Brown*, *supra*, that the foreign law determines not only

liability but "the measure of the maximum recovery", he added only that limitation of liability "may" stand on different grounds.

In short, it seems to us that the Court did not have to say in *The Titanic* that limitation of liability is in the nature of a remedy in order to uphold the petition of the White Star Line. The earlier decisions in *The Scotland*, *The Great Western*, and *La Bourgogne*, as we have seen, were not based on any such theory. Rather, their rationale was that since the particular torts occurred on the high seas, where the law of no country has exclusive application, the law of the United States as to limitation of liability will be applied where foreign ship-owners become involved in litigation in our courts. It would appear to have been unnecessary to go further than this in answering the questions certified in *The Titanic*.

To view limitation of liability itself as a remedy is, we suggest with the utmost deference, to place the end sought in the same category with the procedural machinery through which that end is attained. In other words, limitation of liability is, we submit, "an absolute legal right," as stated by the District Court in *The Titanic* (p. 509), but, as in the case of any other right, it must be secured through varying modes of procedure.

A few examples will suffice to illustrate the difficulties into which we are led by conceiving of limitation of liability as a remedy. A ship-owner seeking limitation of liability has at least two methods available. He may file a petition for limitation under R. S. § 4285, 46 U. S. C. A. § 185, and Supreme Court Rule 51, or he may plead limitation of liability as a defense under R. S. § 4283, 46 U. S. C. A. § 183, *The Scotland*, *supra* (pp. 18, 19); *The Chickie*, 141 Fed. (2d) 80, 85 (C. C. A. 3). (The petitioners have also pleaded the Belgian limitation law as a defense in their answer to the respondents' libel). If a ship-owner elects

to plead limitation of liability as a defense is he pleading a remedy? Again, if he relies on the $500 per package limitation of the Carriage of Goods by Sea Act, 46 U. S. C. A. §1304(5) is he relying on a remedy rather than a statutory right? We should suppose that the answers would be "No". Limitation of a ship-owner's liability is, to our mind, no more a remedy than a limitation on the amount recoverable in a death case. *Northern Pac. R. Co. v. Babcock, supra.* If it is to be considered as a remedy we fear that Bouvier's definition of a remedy as "the means employed to enforce a right or redress an injury," *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, 384, needs some revision.

The bearing of the *Titanic* decision on a situation such as this one, has, so far as we are aware, been commented upon in but two cases, *The Mandu*, 102 Fed. (2d) 459 (C. C. A. 2), and *Royal Mail Steam Packet Co.* v. *Companhia de Navegacao Lloyd Brasileiro*, 31 Fed. (2d) 757 (E. D. N. Y.).

In *The Mandu*, (already discussed, pp. 15, 16) the Court, after holding that the law of Brazil governed in determining both the liability and the extent of the liability of the colliding ships, said that any limitation of liability beyond that resulting from the application of the provisions of the Collision Convention would be determined by the law of the United States under *The Titanic*. It will be noted, however, that the bond posted by the *Mandu's* owner was for her full value, and that the owner petitioned for limitation of liability under United States law (*Mandu* Record, pp. 52-60). Since the owner of the *Denderah* had contended that the Brussels Collision Convention did not apply it could not very well say that limitation of liability was governed by the Brussels Limitation Convention. In short, there was no issue between the parties as to what limitation of liability law should apply, with the result that the only law that could possibly be applied was that of

the United States. The reference to *The Titanic*, was therefore dictum.

In *Royal Mail Steam Packet Co. v. Companhia de Navegacao Lloyd Brasileiro*, the British steamer *Silarus* collided with the Brazilian steamer *Almirante Jaceguay* in the River Schelde near Antwerp. A suit for damages was then brought by the owner of the *Silarus* and the respondent made a motion asking the Court to decline jurisdiction. On the denial of the motion the respondent filed an answer setting up the limitation of liability statute of Belgium as a defense and claiming limitation thereunder. The libellant excepted to the defense and the respondent submitted to the exception in open court and consented to an order striking the defense out. The libellant later amended its libel to allege that liability for the collision was governed by the law of Belgium. Thereupon the respondent filed an amended answer in which it again set up the Belgian limitation law as a defense. It attempted to justify this action because of the amendment of the libel. The libellant excepted to this defense and the exceptions were sustained.

In the course of its opinion the Court said that the right to limit liability is controlled by the statutes of the United States, which relate not to the right or liability but to the remedy, citing *The Scotland*, *La Bourgogne* and *The Titanic*. It is plain, however, that the respondent had become involved in such a procedural tangle through its previous actions that it had in any event foreclosed itself from relying on the Belgian limitation law. This was emphasized by the Court, which pointed out that the respondent, because of its acquiescence in the exception to its original defense, had in effect conceded that limitation of liability relates to the remedy and is governed by the law of the forum, and that its questioning of the libellant's right to amend came too late because it had not excepted to the amended libel. Thus the Court was not required

to decide which limitation of liability law was the applicable one.

Since this Court, where a question of conflict of laws has been involved, has drawn a clear line of distinction between torts committed on the high seas, where no Nation is sovereign, and torts committed within the boundaries of another jurisdiction, it is difficult to believe that it intended, in deciding *The Titanic*, to make limitation of liability an exception to the rule stated in the cases within the second class. Indeed, the rule, as stated on those cases, is sufficiently broad and specific to include limitation of liability.

It would seem that the *Titanic*, even though the collision was with an iceberg instead of another vessel, falls directly within the doctrine of *The Scotland*, *The Belgenland*, *The Great Western* and *La Bourgogne*, *supra*. If so, the statements in the opinion that limitation of liability is a remedy were unnecessary and we venture to suggest that the decision should be modified accordingly. It appears, further, that the decision could stand some modification or explanation to make it clear that it does not apply to torts committed within a country or state other than the one in which suit is brought. Lastly, if there is no other alternative, the decision, we respectfully suggest, should be overruled.

POINT III.

If the Court finds that the law of Belgium as to limitation of liability is the applicable one, the petitioners, we submit, should be held entitled to claim the benefit of that law by petition.

The respondents' exceptions, as stated, were based on the alleged failure of the petitioners to transfer their interests in the vessel and her freight to a trustee or to deposit with the court a sum equal thereto or approved security therefor under 46 U. S. C. A. § 185 and the Admiralty Rules of this Court (R. 13). The District Court sustained the exceptions partly for this reason (Order, R. 14, 15; Conclusion of Law, No. 5 R. 19). But whatever reasons the respondents' counsel may advance on this basis to defeat the petition as to Black Diamond—and we believe they cannot be sustained—such reasons can have no application whatever to the United States, which was not required to post any bond or transfer any interest to a trustee.

The lower Court, although apparently considering the Belgian law to be controlling if its limitation attaches to the right, held, for reasons that are not clear to us, that the petitioners could not invoke that law by petition but could raise it as a defense. (See discussion in Point IV, pp. 29-31). The petitioners, as previously stated, have pleaded the Belgian limitation law as a defense in their answer to the respondents' libel. But a concourse of claimants cannot be secured by a defense as it can be by petition.

Article 1 of the Brussels Limitation Convention limits the ship-owner's liability to the value of the vessel and her freight (Petition, Art. Twelfth, R. 7). Up to this point the Convention is worded virtually the same as our statute. The proviso in Article 1, however, places a limit of £8. per ton on value and Article 4 defines freight as a lump sum

equal to 10% of the vessel's sound value. Thus while in some instances the value of the ship on the £8. per ton basis might be less than her actual value, the freight, fixed on the arbitrary 10% basis, might be far in excess of the actual freight. In any case the Convention fixes the value of the ship and freight for limitation purposes.

The respondents' counsel probably will argue that the term "interest" in our limitation statute and this Court's Rules should be construed literally and held to mean the petitioners' whole interest in the vessel and her freight. If, however, the Court holds that limitation of liability is governed by the law of Belgium, the petitioners' "interest" in the vessel and her freight would, it seems clear, be that fixed by the Belgian law, and it is that interest for which Black Diamond has posted a bond for $325,028.79.

The District Court, in *The Titanic*, evidently saw nothing out of the way in permitting the White Star Line to set up the British limited liability law in its petition, for after dismissing the petition on the ground that the British law applied, it granted leave to amend (p. 512) which could only have been for the purpose of allowing the petitioner to set up the English statute.

We do not see how it would do any violence to R. S. § 4285 to take the petitioners' interest in the ship and her freight at the figure arrived at under the Convention's provisions. To do so would simply be to follow the consistent policy adopted by the courts of construing the statute liberally in favor of ship-owners.

In *Coryell* v. *Phipps*, 317 U. S. 406, this Court, referring to the construction of the statute with respect to privity, said (p. 411):

> "That construction stems from the well settled policy to administer the statute not 'with a tight and grudging hand' (Mr. Justice Bradley in Providence & New York S. S. Co. v. Hill Mfg. Co., 109 U. S. 578, 589), but 'broadly and liberally' so as 'to achieve

its purpose to encourage investments in shipbuilding and to afford an opportunity for the determination of claims against the vessel and its owner.' *Just* v. *Chambers*, 312 U. S. 383, 385."

See also: *Larsen* v. *Northland Trans. Co.*, 292 U. S. 20, 24.

The policy of the courts to interpret the statute broadly is well illustrated by *The Scotland*, *supra*, where limitation of the liability was pleaded as a defense. Objection was made that the ship-owners did not follow the statute by giving up and conveying to a trustee the strippings of the wreck and the pending freight. The Court said (p. 34) that this was not necessary; that where all the parties injured appeared as libellants or intervenors, an answer setting up such a defense gave the ship-owners all the protection they needed; and that it was sufficient to enter a decree against them for the amount of their limited liability and to distribute the sum among the parties entitled to it.

We therefore respectfully submit that this petition should be sustained.

POINT IV.

The reasons given by the lower Court for affirming the District Court's order of dismissal, have, it is believed, no application to this case.

We have had considerable difficulty in understanding the lower Court's opinion, but if we interpret it correctly it found the petitioners to be in a dilemma because of the disparity between the value of the *Norwalk Victory*, concededly $1,000,000. at the time of the collision, and the asserted limitation of $325,000. on the petitioners' liabilities under the Belgian law.

The first horn of the dilemma, thought the Court, made it impossible for the petitioners to commence this proceeding at all if the limit of their liabilities was $325,000. when the ship's value was $1,000,000. In support of this holding the Court cited *The Aquitania*, 20 Fed. (2d) 457 (C. C. A. 2), *Curtis Bay Towing Co.* v. *Tug Kevin Moran*, 159 Fed. (2d) 273 (C. C. A. 2), and *The George W. Fields*, 237 Fed. 403 (S. D. N. Y.). The *Aquitania* and *Curtis Bay* cases, however, involved situations in which the known or foreseeable claims were nowhere near the ship's value (which of course fixed the limitation of liability under United States law) and limitation proceedings were accordingly held to be without basis. The petition was sustained in the *Moran* case because it appeared likely that the claims might exceed the tug's value. The situation here is just the reverse of that in the *Aquitania* and *Curtis Bay* cases, for the known claims exceed many times over the limitation claimed. Counting in the claim for the loss of the *Merganser* alone, the claims approximate $2,000,000.

Under the second horn of the dilemma, it is said, the bond posted by Black Diamond is too small if the liabilities may exceed $325,000. But if the Belgian law is held applicable the value of the *Norwalk Victory* would be immaterial, since it was not lower than £8. per ton, plus freight, as fixed by the Convention. If limitation were to be determined by United States law, the bond of $325,028.79 is of course too small.

It all comes down in the last analysis to the question as to which is the applicable law. If the Belgian law governs—and the lower Court's view seemed to be that it does, if it attaches to the right (R. 27)—there is, as we see it, no dilemma at all. The dilemma only arises by bringing in the American law as opposed to the Belgian law, which is the very question to be decided.

The Court also said that the petitioners were confined to asserting their privilege (namely, limitation of liability)

as a defense to suits brought against them (R. 27). But it then went on to say that the questions raised by the petition could only arise if the petitioners were sued at law, citing *Ex Parte Green*, 286 U. S. 437. We do not see the applicability of the *Green* case. There Green sued Langnes, the owner of the vessel *Aloha*, in the Superior Court of Washington. Langnes then filed a petition for limitation of liability in the federal court. This Court, in *Langnes* v. *Green*, 282 U. S. 531, had held that the district court should have permitted the action to proceed in the State court, retaining the limitation petition for future action, if necessary. Later Green made an issue in the State court as to the right of Langnes to limitation and this Court, in *Ex Parte Green*, held that if Green pressed the issue it was cognizable only in admiralty, but if he withdrew it the case could remain in the State court. We fail to see how any such situation exists here. The present question is whether, if the Belgian limitation law applies, the petitioners, aside from having the right to plead that law as a defense, may invoke it by a petition for limitation of liability.

Lastly, the Court stated that the only suit against the petitioners in this country is in admiralty, wherein the right to limit can be tried, but it qualified this remark by saying, or indicating, that the petitioners would be faced by the same dilemma in the admiralty suit as was thought to exist in connection with the limitation petition.

The lower Court, in short, failed to decide the question presented by this petition, and, instead, sustained the dismissal of the petition on what we believe to be altogether erroneous grounds. It should, we submit, have held that the Convention places a limitation on the rights of claimants against the vessel, that the Belgian limitation law governs, and that the petitioners could properly invoke such law by this petition.

POINT V.

A denial of the benefits of the Belgian limitation of liability law to the petitioners would lead to the anomalous result of depriving Black Diamond of any real limitation of liability at all.

Since Black Diamond was the bareboat charterer of the *Norwalk Victory*, and hence her owner *pro hac vice*, it was responsible for her navigation. *Leary* v. *United States*, 14 Wall. 607; *Hahlo* v. *Benedict*, 216 Fed. 303 (C. C. A. 2). Therefore, in the absence of some provision in the charter making the United States liable, Black Diamond ultimately will have to stand the entire loss, if liability is found to exist. The United States, moreover, is not a party to the British suit.

Consider the predicament in which Black Diamond would find itself if limitation of liability herein were to be decided by the law of the forum. Under United States law the limitation of liability would be at least a million dollars, because that was the floor price placed on Victory ships by the United States Maritime Commission. Pending freight and passage money probably would be about offset by the relatively minor collision damage sustained by the *Norwalk Victory*. If Black Diamond were to petition for limitation of liability under our law, it would be required to deposit an *ad interim* stipulation of approximately one million dollars. But it has already posted bail equivalent to a million dollars in the High Court of Justice of England in the suit brought against it by the *Merganser's* owner (Petition, Art. Seventh, R. 6).

If the law of England were the same as ours we would have filed a petition for limitation of liability there di-

rectly after the commencement of the suit for the loss of the *Merganser*. We were advised by our London solicitors, however, that under the English practice a ship-owner must admit liability before a petition for limitation of his liability will be entertained. This, of course, made the filing of a petition impossible, as we denied liability.

The British practice is set forth in *Hill* v. *Audus* (1855), 24 L. J. Ch. 229, where the Court, considering the Merchant Shipping Act of 1854, said (p. 231):

> "It was obviously the full intention of the act of George the Third that the owner should be permitted to come into court, and say, 'I am liable; I want to bring the fund into court and to be protected from a multiplicity of actions.' All this is very much in the nature of interpleader; and the only question is, the extent of damage suffered by each party. The present act is certainly wider in its terms than some parts of the former act— * * * The section (514) gives the first charge on the fund to the Board of Trade, and then it goes on to enable this Court to determine the amount of liability, and to distribute the fund among the several claimants. All that the Court has to do is, to ascertain the amount of liability under this section; but if a suit should be instituted in which it should be found that there was, after all, no liability, then all the proceedings would have had to be gone through, and, after all, it might be found that the whole suit was about nothing. There would be no amount to be ascertained, and nothing to be divided. The words of the 514th section, that create the difficulty, must mean that the owner is to come into court, and say, 'I allege upon the face of my bill that I have incurred some liability, and I apprehend claims with respect to that liability,' and to bring the fund into court; and what the legislature means is, that the owner having admitted the fact of his liability, the Court is to get in the fund and distribute it among the several claimants. The act intended that the proceedings should be taken here after the liability had been admitted. A considerable

and proper advantage is given, after that, to persons bringing their actions, which explains the subsequent clause about stopping all actions. As soon as this Court takes upon itself to ascertain the amount of damage all actions are stopped, but they are only stopped on the terms of liability to some degree being admitted."

The majority of the respondents, aside from the British Government, are British nationals. Had we been able to institute limitation proceedings at once in England we could have had the British cargo-owners, with the possible exception of the Crown, and any of the other interested parties who might have been subject to the jurisdiction of the Court, restrained from prosecuting their claims elsewhere than in the English limitation proceedings. As it is, Black Diamond is faced with this suit in the United States on top of the British suit.

And this is not all. There are still the claims of the Belgian Government for the expense of removing the wreck of the *Merganser* and for damage to the bank of the River Schelde (Petition, Art. Seventh, R. 6). That Government, we understand, has a statutory claim on the owner of the *Merganser* for the removal cost, independent of any question of fault, and this claim is of course subject to the owner's right of limitation of liability. The Belgian Government, in addition to suing for damage to the river bank, can therefore be expected to come back on Black Diamond for whatever part of the expense of raising the wreck may be uncollectible from the *Merganser's* owner. (We have recently learned that the Belgian Government has already started suit in a Belgian Court.) The owner of the *Merganser* will of course add any amount paid to the Government onto its claim against Black Diamond. Besides all this there is a claim for the death of the *Merganser's* steward and, for all we know, there may be additional cargo claims.

If the *Norwalk Victory* were held to be solely at fault, Black Diamond—unless it can secure limitation under the Belgian law—would have to pay out something approaching a million dollars on the respondents' claims, plus whatever amount the English Court might decree for the loss of the *Merganser* and the death of her steward, plus the amounts awarded to the Belgian Government. The net result would be that Black Diamond would have to pay claims far in excess even of the high limitation of liability under American law, to say nothing of the Belgian law. Such a result as this, in addition to being palpably unjust, might be well nigh disastrous.

In spite of the fact that the collision occurred in Belgian waters, on a voyage of the *Merganser* from England to the Continent, and with the Courts of England, Holland and Belgium open to them, the respondents have seen fit to resort to our courts, over 3,000 miles from their home shores, with the hope of bettering their situation in reliance on the *Titanic* decision and the practically prohibitive limitation under United States law. Could there be a better example of the injustice of applying the varying limitation of liability laws of different countries, depending solely on the location of the suit, in a case where a tort has been committed within a particular jurisdiction? We believe that the reasons for applying the *lex loci delicti* are unanswerable.

CONCLUSION.

The decree of the Circuit Court of Appeals should be reversed and this petition for the limitation of the petitioners' liability under the terms of the Brussels Limitation Convention should be upheld.

Dated, New York, November 19, 1948.

Respectfully submitted,

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ROBERT M. DONOHUE,
Of Counsel.

Appendix A.

The relevant provisions of the Brussels Limitation Convention are as follows:

"Article 1. The liability of the owner of a sea-going vessel is limited to an amount equal to the value of (fol. 9) the vessel, the freight, and the accessories of the vessel, in respect of—

(1) Compensation due to third parties by reason of damage caused, whether on land or on water, by the acts or faults of the master, crew, pilot, or any other person in the service of the vessel;

* * * * * * * *

(5) Any obligation to raise the wreck of a sunken vessel, and any obligations connected therewith;

* * * * * * * *

Provided that, as regards the cases mentioned in Nos. (1), (2), (3), (4) and (5), the liability referred to in the preceding provisions shall not exceed an aggregate sum equal to £8 per ton of the vessel's tonnage.

* * * * * * * *

Article 4. The freight referred to in Article 1 (including passage money), is deemed, as respects vessels of every description, to be a lump sum fixed at all events at ten per cent. of the value of the vessel at the commencement of the voyage.

* * * * * * * *

Article 7. Where death or personal injury is caused by the acts or faults of the captain, crew, pilot or any other person in the service of the vessel, the owner of the vessel is liable to the victims or their representatives in an amount exceeding the limit of liability provided for in the preceding Articles up to £8 per ton of the vessel's tonnage.

* * * * * * * *

Article 10. Where a person who operates the vessel without owning it or the principal charterer is liable under one of the heads enumerated in Article 1 or (fol. 10) Article 7, the provisions of this Convention are applicable to him.

Article 11. For the purposes of the provisions of the present Convention, 'tonnage' is calculated as follows:

In the case of steamers and other mechanically propelled vessels, net tonnage, with the addition of the amount deducted from the gross tonnage on account of engine-room space for the purpose of ascertaining the net tonnage; * * *"

Appendix B.

Sections 4283(a) and 4285 of the Revised Statutes, as amended by the Act of June 5, 1936, 46 U. S. C. A. § 183(a) and § 185, read as follows:

"Sec. 4283(a). The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

Sec. 4285. The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter, as amended and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 4283, as amended, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 4283, as amended. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease."

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OCTOBER TERM—1948

No. 121

BLACK DIAMOND STEAMSHIP CORP.,
Petitioner,

vs.

ROBERT STEWART & SONS, LTD., *et al.*,
Respondents.

REPLY BRIEF FOR THE PETITIONER, BLACK DIAMOND STEAMSHIP CORP.

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JUDICIAL PRINTING CO., INC., 82 Beekman St., N. Y.—BEekman 3-9084-5-6 — 1953

INDEX

PAGE

I The decision of the Court of Appeals 1

II The respondents' discussion of the history of limitation of liability and the methods of invoking it 4

III The decisions of the lower courts and other authorities cited by the respondents in support of their argument that the United States law as to limitation of liability applies 9

IV—The respondents' comments on the decisions applying the *lex loci delicti*, cited in Point I of our main brief 12

V—The Government's status in this case and the effect of its being exempted, as a corporation sovereign, from any obligation to give a bond 14

VI—The *Norwalk Victory-Merganser* litigation in England and the petitioners' so-called "dilemma" 16

VII—Concluding discussion as to the difference between rights and remedies 18

TABLE OF AUTHORITIES CITED.

Cases.

Aquitania, The, 20 Fed. (2d) 457 (C. C. A. 2) 2, 3

Berkovitz, Matter of v. Arbib & Houlberg, 230 N. Y. 261 19

Bourgogne, La, 210 U. S. 95 7

PAGE

Chickie, The, 141 Fed. (2d) 80 (C. C. A. 3) 15
Cuba Railroad Company v. Crosby, 222 U. S. 473 13
Edmund Fanning, The (unadjudicated) 11
Great Western, The, 118 U. S. 520 11
Gypsum Prince-Voco, The, 1945 A. M. C. 585 (S. D. N. Y.) 11, 12
Mandu, The, 102 Fed. (2d) 459 (C. C. A. 2) 9, 12
Mandu, The, 114 Fed. (2d) 361 (C. C. A. 2) 9
Marine Transit Co. v. Dreyfus, 284 U. S. 263 19
Mosby v. Manhattan Oil Co., 52 Fed. (2d) 364 (C. C. A. 8) 13
Murray Oil Products Co., Inc. v. Mitsui & Co., Limited, 146 Fed. (2d) 381 (C. C. A. 2) 19
New Jersey Steam Navigation Company v. Merchants' Bank, 6 How. 722 20
Norge, The, 156 Fed. 845 (S. D. N. Y.) 10, 11
Northern Pac. R. Co. v. Babcock, 14 Sup. Ct. Rep. 978 (154 U. S. 190) 13
O'Neil v. Cunard White Star, Limited, 160 Fed. (2d) 446 (C. C. A. 2) 8
Red Cross Line v. Atlantic Fruit Company, 264 U. S. 109 19
Royal Mail Steam Packet Co. v. Companhia de Navegacao Lloyd Brasileiro, 31 Fed. (2d) 757 (E. D. N. Y.) 9
Scotland, The, 105 U. S. 24 ..... 5, 8, 11, 15
Sonnesen v. Panama Transport Co., New York Court of Appeals, unreported 8
State of Virginia, The, 60 Fed. 1018 (E. D. N. Y.) 11
Thingvalla, The, 42 Fed. 311 (E. D. N. Y.) 10
Thingvalla, The, 48 Fed. 764 (C. C. A. 2) 10
The Titanic, 233 U. S. 718 ..... 5, 6, 7, 10, 13
Titanic, The, 209 Fed. 501 (S. D. N. Y.) 7, 8, 11, 13

PAGE

Western Union Telegraph Company v. Brown, 234 U. S. 542 13

CONVENTIONS AND STATUTES.

Brussels Limitation Convention 1, 2, 6

Brussels Collision Convention 9

R. S. 4283 15

R. S. 4285 14

New York Arbitration Law, L., 1920, ch. 275; Consol. Laws, ch. 72 18

United States Arbitration Act, 9 U. S. C. A. § 1 *et seq.* 19

RULES OF THE SUPREME COURT

Admiralty Rule 51, 28 U. S. C. A. § 723 14

MISCELLANEOUS

Restatement, Conflict of Laws § 411 10

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I.

The decision of the Court of Appeals.

In the fourth point of their brief (pp. 38, 39) the respondents' counsel, in discussing the lower Court's decision, say: (1) That the Court erred in stating that an allegation in the limitation petition that the Brussels Limitation Convention attaches a limit to the right would have been an allegation of fact; (2) that the Court should have met and decided the issues presented by the petition. We agree with our opponents on both points but naturally differ with them as to what the Court should have decided if it had met the issues.

(1) In drafting the limitation petition we studiously avoided inserting anything in it which might look like a conclusion of law for we were forewarned that the respond-

ents' counsel probably would except to a petition invoking foreign law and we wished to have the allegations so phrased as unquestionably to be allegations of fact which would be admitted by the exceptions. In stating the provisions of the Convention we were of course setting forth matters of fact and it was a surprise to hear from the Court that an allegation by us that the limitation provided by the Convention was a limit attached to the right would also have been an allegation of fact. We supposed that such an allegation would be a conclusion.

Article Twelfth of the petition (R. 7, 8) sets forth the salient provisions of the Convention which need no embellishment from us as they speak for themselves. We therefore believe that it was unnecessary for the Court to read the petition as though it had contained the allegation referred to. That the Convention attaches a limit to the right seems obvious. Article 1 (R. 7) says: "The *liability* of the owner of a seagoing vessel is *limited* to an amount equal to the value of the vessel etc." (Italics ours.) It is just as if the Convention had said that claimants are limited in their recoveries to the vessel's value, plus freight, as determined by the Convention.

(2) Whatever we may think of the District Court's decision, it can at least be admitted that it met the issues presented by the petition and decided them. That its conclusions were adverse to the petitioners and, we believe, erroneous, cannot alter that fact. The same, unfortunately, cannot be said for the decision of the Court of Appeals.

To illustrate just how far afield the lower Court went we need do no more than refer to *The Aquitania*, 20 Fed. (2d) 457 (C. C. A. 2), which it held to be controlling, and which enabled the Court to create the dilemma on whose horns it found the petitioners to be impaled. There the steamer *Aquitania* collided with the fishing schooner *Malicia*, causing the deaths of the five members of the schooner's crew.

The decedents' representatives sued the Cunard Steamship Company, Limited, owner of the *Aquitania*, at common law, claiming damages amounting to $205,000. The Cunard Line then filed a petition for limitation of liability, posting an *ad interim* stipulation for $9,225,276.30, the value of the *Aquitania* and her pending freight. Because of the tremendous difference between the claims filed and the ship's value, the Court held that limitation proceedings could not be invoked by the ship-owner to bring all claims into concourse, there being no possibility that the claims would equal the ship's value.

To make the *Aquitania* decision applicable to the case at bar (disregarding the conflict of laws question) we would have to treat the figure of $325,000., which the petitioners claim to be the limit of their liability under the Belgian law, as representing the total amount of claims involved, and then compare that figure with $1,000,000., the value of the *Norwalk Victory*. And that is just what the Court of Appeals did. Certainly it requires no extended argument from us to demonstrate the error in this reasoning. For instead of having claims which total, in the aggregate, but a fraction of the value of the ship and her freight (the limit of liability under our law) as in *The Aquitania*, we have claims aggregating $2,000,000. as against an asserted limitation of liability of $325,000. Since, moreover, the Court disclaimed any intention of deciding the conflict of laws question, we do not understand why it referred to the value of the *Norwalk Victory* at all, as that was an entirely irrelevant matter unless the law of the United States were to be applied.

II.

The respondents' discussion of the history of limitation of liability and the methods of invoking it.

In their first point (pp. 14-22) the respondents' counsel have gone deeply into the history of the limitation of liability laws of different countries and the reasons underlying them. There can, of course, be no dispute between us here, for we all know that the maritime nations of the world, with the object of building up their merchant marines, have held forth inducements to encourage the investment of capital in the building and operation of ships, and of these inducements limitation of liability has been one of the most important. But as interesting as this history is, we do not see that it throws any particular light on the immediate problem at hand, unless, as the Government's counsel indicate, it lends support to the petitioners' contentions.

Counsel, in their second point (pp. 23-27), then proceed with an outline of the methods by which limitation of liability may be secured in the United States, England and Belgium. We observe that they have gone outside the record for material for their exposition of the procedure in Belgium (pp. 25-27). While we do not have any particular objection to this slight irregularity we do not vouch for the accuracy of the statements.

What this of course all leads up to is the conclusion which our opponents ask the Court to make, that limitation of liability is a remedy. On page 9, in their Summary of Argument, Point I, after remarking that limitation of liability stems from European protectionist doctrines of the 17th century, they say that its origins, nature and procedures "illustrate why our courts have always held that it pertains to remedy". One might think from this that the

rule contended for has existed from time immemorial, whereas the first mention of the word "remedy" in connection with limitation of liability was made by Mr. Justice HOLMES in *The Titanic*.

On page 6, in stating the District Court's opinion, counsel compare a limitation of liability proceeding to a proceeding in bankruptcy. (This comparison, however, was not in the opinion.) Again, on page 27, they liken it to a creditor's bill or bankruptcy. In drawing this analogy they pass over the objectives which the ship-owner and the debtor are seeking. The ship-owner's final objective, of course, is the limitation of his liability, although numerous procedural steps must be taken before he can secure it. What the debtor in bankruptcy looks forward to is a discharge from the burden of his debts after an adjudication of bankruptcy. The debtor is then entitled to a discharge provided that he has fully and faithfully complied with the provisions of the Bankruptcy Act. Would anyone think of calling a discharge of a debtor in bankruptcy a remedy? No, it is a statutory right assured to a bankrupt upon his fulfilling the conditions of the Bankruptcy Act. The same is true of a limitation of liability proceeding, the final result of which is the fixing of the amount of the ship-owner's liability, in accordance with a prescribed standard, and the satisfaction of the final decree out of the limitation fund. To call this ultimate objective of the ship-owner a remedy is, to our mind, a contradiction of terms.

We note that counsel, in spite of their elaborate discussion of limitation of liability procedures, have had very little, if anything, to say about limitation when pleaded as a defense to a libel in admiralty, which was the procedure adopted by the ship-owner in *The Scotland*, 105 U. S. 24, as we have seen. Such procedure is a very simple one indeed, where the interested parties are before the court, and involves little more than the disposition of an ordinary admiralty suit.

The fact that limitation of liability is pleadable as a defense is further proof of the weakness of the respondents' argument, for if limitation of liability when invoked by petition is a remedy it would be equally a remedy when interposed as a defense in an answer. But whoever heard of pleading a remedy as a defense? While an answer to a libel is in itself of course procedural, the defenses pleaded in the answer manifestly are in a different category. They are the assertion of rights.

On page 21 reference is made to Article 12 of the Brussels Limitation Convention, reserving the right to the Contracting States not to apply the Convention rules in favor of a non-contracting State, and it is suggested that a Belgian court might not enforce the Convention rules in favor of the *Norwalk Victory* since the United States has not adhered to the Convention. Well, the Convention has been in force in Belgium for over 17 years, with no intimation of a withdrawal of its benefits from American nationals in appropriate cases, and at this juncture in world affairs, with the United States supporting the Western Union and the Atlantic Alliance in the offing, it is safe to say that any such action by Belgium is wholly beyond the realm of probability. Furthermore, the withdrawal of the Convention's benefits would be a matter for the political and not the judicial branch of the Belgian Government. There will be time enough to consider Article 12 when it is enforced.

On page 11, in their Summary of Argument, Point III, and in their third point (pp. 28-32) counsel cite varying benefits to be derived from different limitation of liability systems, depending upon circumstances, and undertake to say what we would have done had the *Norwalk Victory* instead of the *Merganser* been sunk. They cite *The Titanic* to illustrate their point. It is a classic example indeed. When the *Titanic* went down 1490 people lost their lives. All that was left were a few lifeboats and the pending freight and passage money, which, added together, made a

limitation fund of about $61,000 under American law. But under the British law, at 15£ per ton, the fund would have been several million dollars. We could by way of retort ask our opponents whether they would be arguing so strenuously for the American law if the *Norfolk Victory* had been sunk. We dare say that under such circumstances they would have been glad to receive $325,000. But arguments of this sort lead us nowhere. The question is, not what foot the shoe is on, as counsel remark, but what the applicable law is, regardless of benefits or detriment to either side.

On page 30 it is said that the conflict of laws question now before the Court is substantially the same as the one certified in *The Titanic*, and it is argued that there is no difference in principle between a tort committed on the high seas and one committed within a foreign jurisdiction. We must dissent emphatically from these views and believe that our position is sustained by the two lines of decisions cited in Points I and II of our main brief.

Our opponents, by a forced process of reasoning, attempt to show that *The Titanic* was decided by the District Court, 200 Fed. 501 (S. D. N. Y.) on the same basis as though the disaster had occurred in Southampton harbor, and suggest that the effect of this Court's decision in that case is to apply our limitation of liability law to a "foreign tort." For instance, on page 32, they say that the ultimate question in *The Titanic*, as here, was "whether the foreign limitation statutes of the *locus delicti* or those of the forum govern." Again, on page 34, they say that *The Titanic* involved a "foreign tort". They fall into the same error in referring to *La Bourgogne* on page 34. But where was the *locus delicti* in the case of the *Titanic*? Certainly it was not in British waters. It was on the high seas, where no nation is sovereign. It is therefore incorrect to speak of the limitation law of England as though it were in effect where the tort occurred.

Judge Hough, as we have pointed out in our main brief (pp. 20, 21), decided the *Titanic* case on the basis of Mr. Justice Bradley's dictum in *The Scotland*, that if two vessels of the same nationality should collide on the high seas, the law of their common flag would be applied in ensuing litigation in this country.

The statement on page 31, that "tort liability on the high seas is determined by the law of the flag," is too broad. It depends upon the circumstance. The case of *O'Neil v. Cunard White Star, Limited*, 160 Fed. (2d) 446 (C. C. A. 2), cited on page 31, involved the death of a British seaman on a British vessel on the high seas and in such a situation it was only natural that the British law should be applied. The same is true of *Sonnesen v. Panama Transport Co.*, a decision of the New York Court of Appeals, as yet unreported, which also is cited on page 31. But we do not see what all this has to do with the question as to what is the applicable limitation of liability law in the case of a tort committed within the jurisdiction of a foreign country.

On pages 32 and 33, in discussing *The Scotland*, counsel say that the question there was whether the American or the British limitation statute should be applied. We find no such alternatives suggested in the opinion. The only statute in question was that of the United States.

III.

The decisions of the lower courts and other authorities cited by the respondents in support of their argument that the United States law as to limitation of liability applies.

On pages 28, 29 reference is made to *The Mandu*, 102 Fed. (2d) 459 (C. C. A. 2), also 114 Fed. (2d) 361 (C. C. A. 2), and, on pages 35 and 36, to *Royal Mail Steam Packet Co.* v. *Companhia de Navegacao Lloyd Brasileiro*, 31 Fed. (2d) 757 (E. D. N. Y.). But, as pointed out on pages 24 and 25 of our main brief, the statements of the courts in those cases as to the applicable limitation of liability law were purely dictum.

In the footnote on pages 29 and 30 counsel refer to the provisions of the Brussels Collision Convention with respect to the determination of liability in proportion to the degree of fault in mutual fault cases, and compare that rule with the American mutual fault rule, under which the cargo on the carrying ship can recover 100% against the non-carrying ship, with the right of the non-carrying ship to set off or recoup 50% of such recovery against the other vessel. Referring again to *The Mandu* in the footnote, they say that the Court there determined the substantive collision liability and damages under the *lex loci delicti*. As we have emphasized in our main brief, however (p. 16), the effect of that decision was to limit the liability of the steamer *Mandu*, the non-carrying vessel, to 20% of what her liability would have been had our law been applied. The Court, in fact, had to admit that this was a limitation of liability. It might be noted in this connection that the Collision Convention's provision as to the apportionment or allocation of liability only comes into force after fault has been found, and yet the Court in *The Mandu* classified the provision as a right and not a remedy. That the Con-

vention, as indicated in this footnote, states that it shall not affect the rules in force in each country regarding the limitation of ship-owner's liability cannot alter the fact that it actually does place a limitation on the liability of the colliding ships, where both are found at fault.

On page 28 there is cited section 411 of the Restatement, Conflict of Laws, saying that limitation of liability in a maritime cause of action is determined by the law of the forum irrespective of the law which created the cause of action. That, however, is obviously no more than an attempt to restate Mr. Justice HOLMES' opinion in *The Titanic*. Certainly the restatement is incorrect if we are right in our position that limitation of liability, based on a maritime tort occurring in a foreign country, is determined by the law of that country.

On page 34, in a footnote, *The Thingvalla*, 48 Fed. 764 (C. C. A. 2), is cited. We do not see what possible application that case has. There the petitioner, a Danish corporation, owned both the steamers *Thingvalla* and the *Geiser*, which collided on the high seas. Various insurance companies and others interested in the cargoes lost made claim on the *Thingvalla*. The District Court exonerated the vessel, *The Thingvalla*, 42 Fed. 311 (E. D. N. Y.) and its decree was affirmed. The Court consequently did not have to decide the question of limitation of liability. The headnote in the District Court report erroneously states that the petitioner was held "entitled to limitation of its liability." What the Court actually held was that the petitioner was "entitled to *exemption* from liability". (Italics ours).

The case of *The Norge*, 156 Fed. 845 (S. D. N. Y.), also cited in the footnote on page 34, certainly is no authority for the respondents. There the Danish steamship *Norge*, while en route from Copenhagen to New York, struck a derelict or some unknown obstruction and sank, causing the loss of several lives. The owner of the *Norge* petitioned

for limitation of liability and the representatives of the decedents filed claims in the proceeding. The Court found the *Norge* free from fault and dismissed the claims. While the concluding sentence of the opinion (p. 850) said that the petition was sustained, evidently the petition was in the usual form asking for exoneration from or limitation of liability, and what the Court undoubtedly meant was that the prayer for exoneration in the petition was sustained.

In the same footnote the respondents, strange to say, cite an unadjudicated case, *The Edmund Fanning*, as an authority. According to their statement an American ship and her cargo were lost in an Italian port and the owner invoked the American limitation of liability statute. The reason probably was that the American law, in view of the loss of the ship, presumably was more favorable to the ship-owner than the Italian law. What bearing this has on the questions here involved is not apparent to us.

On page 34 *The State of Virginia*, 60 Fed. 1018 (E. D. N. Y.), is cited as evidence of the intent of *The Scotland*, *supra*. (Just what intent is meant is not explained.) There Judge BENEDICT allowed limitation of liability to a British ship-owner in the case of the stranding of its vessel on Sable Island. No reasons were given for the Court's conclusion. We think that the District Court in *The Titanic*, *supra*, aptly characterized the *Virginia* decision. It pointed out (p. 507) that Judge BENEDICT's decisions in the District Court in *The Scotland*, *supra* and *The Great Western*, 118 U. S. 520, which denied the right of foreign ship-owners to limitation of liability under United States law, had been reversed and observed that these reversals apparently led him to change his views and that in doing so he must have overlooked the qualification of the general rule stated by Mr. Justice BRADLEY in *The Scotland*.

The case of *The Gypsum Prince-Voco*, 1945 A. M. C. 585 (S. D. N. Y.), cited on page 36, was decided by a Special

Commissioner and surely adds nothing to the subject under consideration. There the vessels collided in Delaware Bay and the *Gypsum Prince* was found solely at fault and it was stipulated that her owner was entitled to limitation of liability. Various questions were then submitted to a Special Commissioner, one of which was the ship-owner's claim of right to limitation under the American law. In his report the Commissioner referred to limitation of liability as being a remedy. The report was not passed on by the Court as a settlement was reached in accordance with the report. Since the collision occurred in waters of the United States we do not understand how any question could have arisen about the application of our limitation law. We agree with the Commissioner that the American law applied but not on the ground that it was a remedy.

IV.

The respondents' comments on the decisions applying the *lex loci delicti*, cited in Point I of our main brief.

On page 37 counsel brush aside the cases cited in the first point of our main brief with the cursory comment that they are not applicable because they were non-maritime, as if that made any difference in the principles involved. Furthermore, the case of *The Mandu*, 102 Fed. (2d) 459 (C. C. A. 2), cited and discussed on pages 15 and 16 of our main brief, was a collision case.

Counsel further refer to this group of cases (apparently meaning all of them) as being exceptional ones in that they supposedly involved statutes creating rights unknown to the common law, which by their terms limited the measure of recovery under the rights thus created. This, we submit, is a wholly illogical point of distinction and, furthermore, the statement is not correct.

In *Northern Pac. R. Co.* v. *Babcock*, 14 Sup. Ct. Rep. 978 (154 U. S. 190) the death statute of Montana, where Munro was killed, had no limit on the amount recoverable. It was Minnesota, where the suit was brought, which imposed the limitation. In *Cuba Railroad Company* v. *Crosby*, 222 U. S. 473, no statutory cause of action, so far as appears, was asserted, the action being one for personal injuries due to negligence. In *Western Union Telegraph Company* v. *Brown*, 234 U. S. 542, involving negligent delay in the delivery of a telegram, the plaintiff, it is true, recovered under the South Carolina Civil Code, but we should suppose that a cause of action for negligently delivering a telegram was one known to the common law. In *Mosby* v. *Manhattan Oil Co.*, 52 Fed. (2d) 364 (C. C. A. 8), the suit was based upon the creation of a nuisance, which most assuredly was actionable at common law.

As Mr. Justice Holmes said, in *Western Union Telegraph Company* v. *Brown*, "The injustice of imposing a greater liability than that created by the law governing the conduct of the parties at the time of the act or omission complained of is obvious * * *". And yet that is just what the respondents are trying to have done. They are founding their case on an obligation created by the law of Belgium but they want to impose a liability of a million dollars on the petitioners when the law of Belgium provides a limitation of liability to approximately $325,000.

If the language of *The Titanic* were literally followed, as the respondents contend, it would mean that there would be an exception, in the case of limitation of liability, to the rule laid down in the foregoing group of cases, with no logical reason for such an exception.

V.

The Government's status in this case and the effect of its being exempted, as a corporation sovereign, from any obligation to give a bond.

In their fifth point (pp. 40-42) the respondents' counsel profess great surprise that the Government is urging the point that it was not required to file a bond. They speak as though their admission that no bond was required of the United States disposes of the matter and renders the point moot. This is a most peculiar attitude to take, considering that one of the grounds the District Court gave for its dismissal of the petition was that the petitioners had not posted the bond required by the statute.

The point, contrary to our opponents, is an extremely important one and the reason why it is important is this: The respondents apparently contend that, regardless of any question of conflict of laws, the petitioners failed to comply with R. S. § 4285 and Admiralty Rule 51 of this Court because they did not transfer their interest to a trustee or furnish a bond for that interest; that the term "interest" in our law means all of the petitioners' interest and not some lower figure fixed by the law of a foreign country. Whatever the merits of this contention may be with respect to Black Diamond—and we have argued in our main brief that the word "interest" should be given a liberal and not a literal interpretation where a foreign law is involved—the argument completely fails as far as the United States is concerned. In other words, since the United States did not have to give any bond at all, nor was it required to make a transfer of its interest to a trustee, the fact that it did neither of these things constitutes no ground for dismissing the petition. In short, the conflict of laws question

which this petition presents is, we believe, squarely before the Court for decision.

It should be repeated here, parenthetically, that the petitioners have invoked the Belgian law not only by this petition but by defense in their answer to the respondents' libel, under the authority of *The Scotland, supra,* and *The Chickie,* 141 Fed. (2d) 80 (C. C. A. 3), and several other cases to the same effect. The decisions holding that limitation of liability is pleadable as a defense refer to R. S. § 4283. It seems clear, however, that where ship-owners rely on a foreign limitation law, as here, it can be raised by way of defense without regard to R. S. § 4283.

The respondents' counsel, making light of the argument, seek to relegate the Government to a minor role in the case. They call it "a nominal party" herein; this in spite of the fact that the chief explanation they have vouchsafed for bringing their suit in the United States is their desire to hold the United States, as owner of the *Norwalk Victory,* liable in the event that Black Diamond is not able to satisfy a decree obtained by them. This does not strike us as an inconsequential matter.

On page 41 the comment is made that counsel for the Government did not participate in the arguments below. The explanation of this is extremely simple. Black Diamond was the bareboat charterer of the *Norwalk Victory* and, as owner *pro hac vice,* was responsible for her navigation. Therefore the United States naturally looks to Black Diamond to make good any loss sustained by third parties because of negligent navigation, if negligence is found. The writer's firm not only are proctors for Black Diamond in the District Court but also, in accordance with the usual custom in cases of this kind, are counsel for the United States, represented by the United States Attorney for the Eastern District of New York. The separate appearances here are, we understand, due to a rule of the Government requiring that it must be represented by the

Solicitor General in all cases before this Court in which its interests are involved.

On page 42 it is suggested that the Government's argument, based upon its exemption from any requirement as to posting a bond, may safely be ignored in order to avoid a confusion of the issues. Counsel undoubtedly would like to ignore the argument, but far from confusing the issues, it raises one of the most important points in the case.

VI.

The *Norwalk Victory-Merganser* litigation in England and the petitioners' so-called "dilemma".

The respondents' counsel, in their sixth point (pp. 43-46), have conjured up a new dilemma into which to precipitate the petitioners, or at least Black Diamond. It arises, it seems, out of the fact that Black Diamond has been sued in England, which, it is said, is Black Diamond's own fault. On pages 44 and 45 they refer to information received from their English solicitors that our solicitors agreed with the solicitors for the *Merganser*, almost immediately after the collision, to submit to British jurisdiction with respect to the claim for the loss of the *Merganser*, and they insinuate that this was a collusive submission (p. 45). We take decided exception to this statement. Black Diamond submitted to British jurisdiction under a threat that the *Norwalk Victory* would be arrested. Since she was then on her way from Antwerp to Rotterdam the threat of arrest meant arrest at Rotterdam; for certainly the *Merganser's* solicitors, in a case of this size, never would have taken the risk of allowing her to leave that port. Since the jurisdiction of a British Court was preferred to that of a Continental Court, Black Diamond agreed to appear in London. Moreover, it undoubtedly was amenable to process *in personam* in London as it maintained an agency there.

On page 45 it is said that the fact that Black Diamond has posted a bond equivalent to $1,000,000, in the English suit is a complete refutation of our claim that limitation attaches to the right. The argument is wholly without merit. Black Diamond gave bail in this amount because it had no alternative except to file a petition for limitation of liability, which would have entailed an admission of liability, as our opponents concede. If the bail demanded was too high, Black Diamond, when the case is concluded, can ask that the *Merganser*'s owners be condemned in the cost of excessive bail. But bail cannot be reduced to the amount of Black Diamond's statutory liability in England, in advance of limitation proceedings, unless the opposing side concedes its right to limit, which they have not yet seen fit to do. There is no question of conflict of laws in England, as our opponents seem to imply, for England, our solicitors inform us, is one of the three countries in the world which do not apply the doctrine of conflict of laws, the other two being China and Japan. Because of this peculiar situation, the English limitation statute will ultimately be applied in the English litigation.

A further element in the new "dilemma", it is said, was Black Diamond's insistence on initiating limitation proceedings here under the Belgian law, when it should have known that American law applies. It could have had a *forum concursus*, according to our opponents, by the simple expedient of posting a bond for $1,000,000! We pause to wonder how simple this would have been in view of the bail for the equivalent of a million dollars already posted in England. Had we ever entertained such an idea it would, without doubt, have been impossible of fulfillment in the short time at our disposal, for the respondents' suit was not commenced until within two weeks of the expiration of the statutory period for instituting limitation proceedings. Furthermore, a complete concourse could never have been secured anyway as there was no way of forcing

the *Morgancer's* owners to come into proceedings in the United States.

In a further attempt to justify resort to our Courts, when the foreign courts were open to them, counsel for the respondents emphasize the diverse nationalities of the damage claimants. But this, we submit, is no excuse at all. In any case, let us get the record straight on this subject. Twenty claimants joined as co-libellants in the original libel. Recently an amended libel has been filed in which the claimants have been increased to forty. Aside from His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland, and the Kingdom of Belgium, the nationality of the damage claimants is as follows: British, twenty-four, Belgian, eleven, Swiss, two, and American, one. Thus, the great majority of the parties are English and could have been restrained from suing here, had it been possible for Black Diamond to institute limitation proceedings promptly in England, without conceding liability.

No, Black Diamond is not in any dilemma of its own making. It would be more accurate to say that it is enmeshed, through no fault of its own, in an international snarl, which, if not unravelled, bids fair in the final wind-up to deprive it, to all intents and purposes, of any real limitation of liability.

VII.

Concluding discussion as to the difference between rights and remedies.

The difference between a remedial law and a law creating substantive rights is strikingly illustrated by the Arbitration Law of New York, L., 1920, ch. 275; Consol. Laws, ch. 72, providing a means of enforcing arbitration clauses in contracts. The New York Act, a pioneer in this field of

legislation, was followed in a few years by the United States Arbitration Act, 9 U. S. C. A. §1 *et seq.* The constitutionality of the New York law in matters of admiralty and maritime jurisdiction was, it will be remembered, upheld by this Court in *Red Cross Line* v. *Atlantic Fruit Company*, 264 U. S. 109, and the constitutionality of the federal Act was likewise sustained in *Marine Transit Co.* v. *Dreyfus*, 284 U. S. 263.

It was not long after the enactment of the New York law that the question arose, in *Matter of Berkovitz* v. *Arbib & Houlberg*, 230 N. Y. 261, as to whether the Act was retroactive, the arbitration agreement in suit having been made before the law went into effect. Mr. Justice CARDOZO, speaking for the Court, said that a promise to arbitrate even before the Act was neither illegal nor a nullity, although public policy then forbade that it be specifically enforced. Holding that the law was retroactive, he stated (p. 270):

> "The common-law limitation upon the enforcement of promises to arbitrate is part of the law of remedies. * * * The rule to be applied is the rule of the forum. Both in this court and elsewhere, the law has been so declared. Arbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow. This statute did not attach a new obligation to sales already made. It vindicated by a new method the obligation then existing."

The Court of Appeals for the Second Circuit, considering the United States Arbitration Act, reached the same result. *Murray Oil Products Co., Inc.* v. *Mitsui & Co., Limited*, 146 Fed. (2d) 381 (C. C. A. 2).

When Congress passed our limited liability law in 1851 it gave life to no pre-existing thing as it and the New York Legislature did in making agreements to arbitrate enforceable. Before 1851 American ship-owners, when disaster

befell their ships, were liable in full, as held in *New Jersey Steam Navigation Company* v. *Merchants' Bank*, 6 How. 722.

If any further refutation of the respondents' argument that limitation of liability is a remedy were needed, these arbitration acts, we believe, supply it.

Dated, New York, December 16, 1948.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

121

No. 121.

BLACK DIAMOND STEAMSHIP CORP.,
Petitioner,

vs.

ROBERT STEWART & SONS, LTD., *et als.*,
Respondents.

130

No. 130.

UNITED STATES OF AMERICA,
Petitioner,

vs.

ROBERT STEWART & SONS, LTD., *et als.*,
Respondents.

BRIEF FOR RESPONDENTS.

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INDEX.

	Page
Jurisdiction	1
Statement	2
Questions Presented	4
Statutes and Rules Involved	5
The Opinions Below	5
1. The District Court	6
2. The Court of Appeals	6
Summary of Argument	9
Argument	14
I. Introduction	14
The Nature and Origins of Limitation of Liability	14
The History and Purpose of the United States Statutes	15
English Statutes	19
The Brussels Limitation of Liability Convention of 1924 (Belgian Law)	20
II. The procedures on limitation of shipowners' liability illustrate that limitation statutes create no substantive rights but merely afford a remedy in respect of liabilities already assumed to exist	23
American Procedure	23
English Procedure	25
Belgian Procedure	25
All Procedures Illustrate Limitation as a Remedy	27
III. The rule that limitation upon liability affords a remedy governed by the law of the forum is distinct from the rule that *lex loci delicti* controls in the determination of liability; and limitation of liability should not be confused	

PAGE

with statutes creating rights unknown to the common law and which by their terms limit the right thus created and the remedy attached to it 28

IV. The court below should have met the issues presented as did the District Court, and it was improper to assume that a supposed allegation that the Belgian law attaches to the right must be accepted as a fact in considering the exceptions; any such allegation as to the construction or effect of the foreign law is a conclusion and involves a question of law for the court to determine on exceptions 38

V. The petition was rightly dismissed as to both petitioners on respondents' exceptions challenging the sufficiency and competency of the allegations of the petitioners who sought to invoke an inapplicable foreign remedy; it was unnecessary for the court below to state affirmatively that no bond was required of the United States, since none was posted nor required, and the question as to the bond, raised by the Government for the first time in this Court, has no place in the debate 40

VI. If petitioners are in a dilemma regarding a *forum concursus* it is of their own making for submitting voluntarily to British jurisdiction on the one hand, and for failing to comply with the rules, statutes and precedents of the United States forum on the other 43

Conclusion 46

Appendix 47

1. United States Statutes 47

2. Brussels Convention on Limitation of Liability: 1924 49

Table of Cases Cited.

Amalia, The (1863), 1 Moo. P. C. N. S. 471 ..... 9, 10, 20

Chattahoochee, The (1899), 173 U. S. 540 ..... 30n

Cie. Maritime Belge (S. S. *Persier*) v. S. S. *Baron Blythswood*, Tribunal de Commerce, Antwerp, 1939 ..... 27n

Coronet Phosphate Co. v. United States Shipping Co. (S. D. N. Y. 1917), 260 F. 846 39

Edmund Fanning, The, now pending in the Southern District of New York, No. A. 152-42 ..... 34n

Finney v. Guy (1903), 189 U. S. 335 39

Great Western, The (1886), 118 U. S. 520 16

Gypsum Prince-Coco (Report of Special Commissioner, S. D. N. Y.), 1945 A. M. C. 585 (not officially reported) 36

Hill v. Angus (1855), 24 L. J. Ch. 229 ..... 25n

La Bourgogne (1908), 210 U. S. 95 34

Lexington, The (*New Jersey Steam Navigation Co. v. Merchants' Bank*), 6 How. 344 15

Main, The v. *Williams* (1894), 152 U. S. 126 ..... 15, 19

Manda, The (C. C. A. 2nd 1939), 102 F. (2d) 459, 9n, 11, 12, 28, 29, 30n, 37

Manda, The (C. C. A. 2nd 1940), 114 F. (2d) 361 ... 36, 37

Nevada, The (C. C. A. 9th, 1936), 81 F. (2d) 744 ..... 15n

Norge, The (S. D. N. Y. 1907), 156 F. 845 ..... 34n

North Star, The (1882), 106 U. S. 17 ..... 39n

Norwich & N. Y. Trans. Co. v. Wright (1872), 13 Wall. 104 ..... 9, 17, 25n

Ocean Steam Navigation Co. v. Mellor (*The Titanic*) (1914), 233 U. S. 718, 4, 6, 9n, 11, 12, 13, 30, 31, 32, 34, 35, 38, 43, 44

O'Neil v. Cunard White Star (C. C. A. 2nd 1947), 160 F. (2d) 446 31

PAGE

Royal Mail Steam Packet Co. v. *Companhia de Navegaco Lloyd Brasileiro* (E. D. N. Y. 1928), 31 F. (2d) 757 ..... 4, 6, 9n, 11, 35

Royal Mail Steam Packet Co. v. *Companhia de Navegaco Lloyd Brasileiro*, 55 F. (2d) 1082, cert. den. 287 U. S. 607 36

Scotland, The (1882), 105 U. S. 24 ..... 16n, 32, 33, 34

Slater v. *Mexican R. R. Co.*, 194 U. S. 120 37

Smith v. *Condry*, 1 How. 28 36

Sonneson v. *Panama Transport Co.* (N. Y. Court of Appeals, November 24, 1948), 120 N. Y. L. J. No. 108, p. 1 31

State of Virginia, The (E. D. N. Y. 1894), 60 F. 1018, 9n, 11, 34

Thingvalla, The (C. C. A. 2nd 1891), 48 F. 764 ..... 34n

United States, et al. v. *Robert Stewart & Sons, Ltd., et als.*, 167 F. (2d) 308 6

Western Union Telegraph Co. v. *Brown*, 234 U. S. 542 37

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Rules 51 to 54 ..... 4, 5, 23

British Act of Geo. 2, c. 15 (1734) 15, 19

British Act of 53 Geo. 3, c. 159 (1813) 19, 20

Brussels Collisions Convention, 1910 ..... 29n, 30n

Brussels Limitation of Liability Convention of 1924 (Law of 28 November, 1928, effective 11 January, 1929, Code de Commerce, Livre II, Titre Ier, published in *Le Moniteur Belge*, 11 January, 1929) 5, 20, 21, 22, 29n, 49, 50

Carver, Carriage of Goods by Sea (8th ed. 1938), p. 38 ..... 20n

General Admiralty Rules of the United States Supreme Court (46 U. S. C. 185) 23
Rule 27 ..... 12, 28
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Limited Liability Act, R. S. 4282-4289 (1851) (46 U. S. C. 482-489) 16, 17, 18
Marsden, Collisions at Sea (9th ed. 1934):
Pages 161-163 15
Page 164 ..... 15n
Page 165 ..... 20n
Page 166 ..... 16n, 20n
Page 179 ..... 20n
Page 181 18
Merchant Marine Act, 1936, 46 U. S. C. 1151-1182.... 18n
Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), §§ 502-509 ..... 25n
Note 134 A. L. R. 570, 572 39
I Parsons, Maritime Law (1859), Ch. IV 17n
Public No. 391, 74th Cong., August 29, 1935 ..... 17n
Public No. 391, 79th Cong., August 29, 1935 ..... 10n
Report of the Senate Commerce Committee, No. 2061, 74th Cong. 2nd Sess., p. 3 (May 1936) 19
Restatement, Conflict of Laws:
Section 406 31
Section 409 ..... 28, 37
Section 11 ..... 12, 28, 37
Section 412 37
Section 414 37
Robinson on Admiralty (1939):
Pages 238-239 31
Page 879, n. 16 ..... 16n
Page 880, n. 17 ..... 18n
Pages 902-904 ..... 22n

Page
Roscoe's Admiralty Practice (5th ed.), p. 237, *et seqq.* 25n
R. S. 4283 (46 U. S. C. 483) 4, 5
R. S. 4285 (46 U. S. C. 485) 4, 5
Ship Mortgage Act, 1920, 46 U. S. C. 911, *et seq.* 18n
Suits in Admiralty Act, 1920, 46 U. S. C. 742, 743 ..... 2, 41
The International Law Quarterly, Vol. 1, No. 4, 1947. 22n
"The Unification of Maritime and Commercial Law through the Comité Maritime International", by Lord Justice, Sir Leslie Scott and Cyril Miller 22n
Williams and Bruce, Admiralty Practice (3rd ed.), pp. 377-388 ..... 25n
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Page 462 38
Section 333 42
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Page 316 ..... 18n
Page 544 18
Page 643, Table 50
Pages 643-647 ..... 19n
Page 647 ..... 18n
Sections 476-478 ..... 16n
6 Benedict on Admiralty (6th ed. 1941):
Page 5 ..... 30n
Pages 87-91 ..... 5, 49
28 U. S. C. 1254 (1) 1
28 U. S. C. 2408 ..... 24n
46 Code of Federal Regulations, § 299.82 (effective September 4, 1946) 41n
46 U. S. Code:
Section 183 ..... 10n, 17n, 47, 48
Section 185 ..... 48, 49
Section 743 ..... 24n, 46
49 Stat. 960 ..... 10n, 17n

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BRIEF FOR RESPONDENTS.

Jurisdiction.

The decree of the Court of Appeals for the Second Circuit (R. 28) was entered on March 29, 1948. Petition of Black Diamond Steamship Corp. was filed on June 25, 1948, and the petition of the United States of America was filed on June 28, 1948. Respondents did not oppose certiorari, which was granted on October 11, 1948 (R. 29). Jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

Statement.

The American merchant vessel "Norwalk Victory", owned by the pefitioner, United States of America, and operated under bareboat charter by petitioner, Black Diamond Steamship Corp., of Maryland, as owner *pro hac vice*, in a liner service between New York, Antwerp, Amsterdam and Rotterdam, collided on April 28, 1947, with the British merchant vessel "Merganser" in Belgian territorial waters. As a result of the collision, the "Merganser" sank, one of her crew members was killed, and her cargo on board, valued at nearly $1,000,000, was lost.

Shortly after the collision, an action was commenced in England against the "Norwalk Victory" and her owners to recover $1,000,000 for loss of the "Merganser". Although neither the "Norwalk Victory" nor her owners were within the reach of British processes, a voluntary appearance promptly was entered on behalf of the "Norwalk Victory", and petitioner, Black Diamond Steamship Corp., posted bail in pounds sterling equivalent to $1,000,000 (R. 17).

On October 14, 1947, the owners of cargo lost on the "Merganser" commenced a suit in admiralty against the "Norwalk Victory" and against her owners in the United States District Court for the Eastern District of New York, alleging the "Norwalk Victory" to be solely at fault for the collision, and claiming damages of approximately $1,000,000.[1] This suit was brought in the District of the United States where the vessel was found, as required by the Suits in Admiralty Act, 1920, 46 U. S. C. 742 (R. 17).

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[1] All of the known or asserted cargo claims are consolidated in the one action against the United States and Black Diamond in the District Court, and total damages alleged in the libel, as now amended, are $900,000.

On October 28, 1947, counsel for Black Diamond Steamship Corp., on its behalf as bareboat charterer of the "Norwalk Victory", and on behalf of the United States, as owner, filed a petition in the District Court for exoneration from or limitation of liability (R. 1-10). The petition prayed in substance:

(1) That the Court rule, if the petitioners be found liable, that they be entitled to the benefits of the Belgian law in respect of limitation upon shipowners' liability; (2) that the Court approve the bond of petitioner, Black Diamond, in the sum of $325,000, as the amount to which liability might be limited under the Belgian limitation law, although under the United States statute the bond required would be at least $1,000,000, representing the value of the vessel after the collision; (3) that the Court restrain the prosecution or commencement of suits against the "Norwalk Victory" or her owners in respect of damages occasioned by the collision; (4) that all damage claimants be cited to file and make due proof of their claims in the limitation proceeding, and (5) that damages decreed be satisfied *pro rata* out of the limitation fund, and that the petitioner be discharged from all further liability (R. 9-10).

The petition was dismissed on respondents' exceptions (R. 12-13) questioning the competency and relevancy of petitioners' allegations that the Belgian limitation of liability law should be applied, and questioning the sufficiency of the bond of Black Diamond. The District Court (R. 14-15) dismissed the petition and held that shipowners, seeking to invoke the jurisdiction of a United States court in limitation of liability proceedings, must comply with the conditions and requirements of the statutes and Admiralty Rules of the United States, since limitation of liability

pertains to remedy and is governed exclusively by the law of the forum (R. S. 4283, 4285; 46 U. S. C. 483, 485; Admiralty Rules 51-54). The Court of Appeals affirmed, without, however, passing on the issues raised by the respondents' exceptions (R. 25-27).

Questions Presented.

Broadly, the ultimate question sought to be resolved is whether the law of the forum, as evidenced by the statutes and rules of court of the United States applicable to limitation of shipowners' liability, rather than the Belgian law on the subject, shall apply in a proceeding in admiralty in the United States arising out of a collision in Belgian territorial waters.

The principal definitive questions are:

1. Whether the District Court erred in following *The Titanic*, 233 U. S. 718, and *Royal Mail Steam Packet Co.* v. *Companhia de Navegaco Lloyd Brasileiro* (E. D. N. Y. 1928), 31 F. (2d) 757, and in holding that the privilege of a vessel owner to institute a limitation of liability proceeding in a United States court is derived from, created and exclusively controlled by the applicable statutes of the United States, for the reason that limitation of liability does not involve nor does it create substantive rights giving rise to liability, but pertains to the remedy and is, accordingly, governed by the law of the forum.

2. Whether the Court of Appeals erred in affirming the order of the District Court, which dismissed the petition for limitation of liability because it sought to invoke foreign law pertaining to remedy, and because the bond furnished by petitioner, Black Diamond

Steamship Corp., in the sum of $325,000, was on its face inadequate to meet the requirements of the remedial statutes and rules of the forum.

3. Whether a shipowner whose vessel is worth $1,000,000, and who has been sued in the United States for $1,000,000 by cargo-damage claimants, is entitled to maintain any proceeding for *limitation* of liability when he alleges that his liability as a matter of substantive right does not exceed $325,000.

Statutes and Rules Involved.

The pertinent United States statutes are R. S. 4283 and R. S. 4285 (46 U. S. C. 483, 485).

The applicable rules relating to limitation of shipowners' liability are Admiralty Rules 51 to 54, inclusive, of this Court.

The Belgian statute on limitation upon shipowners' liability is alleged in the petition and concededly is intended to conform to the International Convention for the Unification of Certain Rules Relating to the Limitation of Liability of Owners of Seagoing Vessels, signed at Brussels, August 25, 1924 (6 BENEDICT ON ADMIRALTY (6th ed. 1941), pp. 87-91). Pertinent provisions of the United States statutes and the Belgian law, as alleged, are in the Appendix hereto.

The Opinions Below.

The opinion, findings of fact and conclusions of law of the District Court of the United States for the Eastern District of New York (R. 14-19) are not officially reported (but see 1948 A. M. C. 816 for a summary). The opinion of the Court of Appeals

for the Second Circuit (R. 25-27) is reported at 167 F. (2d) 308, and in 1948 A. M. C. 815.

1. The District Court:

The basis for the order of the District Court, dismissing the petition for limitation of liability which attempted to invoke the Belgian law, is set forth in its order and conclusions of law (R. 15, 18-19).

The court sustained the exceptions of damage claimants, the respondents herein, and dismissed the petition on the authority of *Oceanic Steam Navigation Co.* v. *Mellor* (*The Titanic*), 233 U. S. 718, and *Royal Mail Steam Packet Co.* v. *Companhia de Navegaco Lloyd Brasileiro* (E. D. N. Y. 1928), 31 F. (2d) 737 (R. 15). It held that statutory limitation upon the liability of a shipowner does not create substantive rights giving rise to liability, but pertains to a matter of remedy (R. 19). (It avails to the shipowner a remedy analogous to bankruptcy, whereby judgment creditors are forced to resort to a limitation fund, deposited by the shipowner, to be prorated among such creditors, after which the shipowner is fully discharged from all further liability in respect of his tort.) Such matters of remedy, the District Court held, are controlled exclusively by the statutes of the forum, regardless of where the liabilities of the shipowner may arise (R. 14-15, 18-19).

2. The Court of Appeals:

In its opinion, *United States, et al.* v. *Robert Stewart & Sons, Ltd., et als.*, 167 F. (2d) 308, the Court of Appeals affirmed the order dismissing the petition, but on different grounds than those of the

District Court, and on a theory not advanced by counsel in their arguments before the Court.

The court below, unlike the District Court, did not deem it necessary to decide what limitation of liability law should apply in the United States courts. It construed the allegations of the limitation petition liberally as if petitioners had alleged "that the Belgian law did attach to the right" (R. 26). However, in so construing the petition for purposes of considering the respondents' exceptions, the court was careful to point out that it wished "to guard against any inference that this is our own interpretation" of the Belgian law (R. 26). We gather from petitioners' briefs that counsel may have overlooked the fact that the court did not hold that the Belgian limitation law attaches to the right, as a part of Belgian substantive law, rather than the remedy. What the court below did was to assume, by giving the petition the most liberal construction possible, that the petitioners had pleaded, as an allegation of fact in respect of foreign law, that the foreign limitation law attaches to the right (R. 26). This the court considered to be conclusive for the purpose of the exceptions.

The court, having adopted the assumption that the pleadings alleged the Belgian limitation law to attach to the right, and having accepted such assumed allegation to be binding on the exceptants, followed through to syllogistic conclusions flowing from that assumption. If the petitioners' allegation that the Belgian limitation law attaches to the right is a fact properly pleadable and binding as such on the exceptants, then it must follow that petitioners' maximum liability under the substantive foreign law alleged cannot exceed $325,000 (R. 27). In such

circumstances, there is no need for a petition to *limit* liability, as liability cannot, according to petitioners' allegations, exceed that sum. Thus, it is immaterial, said Judge Learned Hand, whether the Belgian law, with its $325,000 limit of liability, or the United States statutes, with a $1,000,000 limit here, is the proper one to be applied in a United States court. Further, he reasoned, if limitation of liability should become a problem, it may always be pleaded by way of defense in the answer to respondents' suit in admiralty against the owners of the "Norwalk Victory" (R. 27).

If, said the court below, the petitioners are wrong in their allegation that the Belgian limitation law attaches to the substantive rights—and the court refrained from passing on the question—then obviously the bond of petitioner, Black Diamond, in the sum of $325,000 is inadequate to support a petition under the applicable United States statutes (R. 27). The court indicated that petitioners, by their own argument, placed themselves in a dilemma in so far as they may have sought a *forum concursus* to the limited extent the United States courts could give it through the medium of a limitation proceeding. Further, it was indicated, as only one suit has been instituted against petitioners in the United States, and that is in admiralty, the need for a *forum concursus* is not apparent (R. 27).

It is the respondents' position that the court below erred in its basic assumption that a conclusion as to the nature of a foreign limitation law may properly be pleaded as if a fact. We submit that such conclusion is solely a question of law to be determined by the courts on facts properly pleaded, and

that the court below should have passed squarely upon the respondents' exceptions as did the District Court.[2]

Summary of Argument.

I.

Limitation upon the liability of shipowners, whereby the owners of a guilty ship may discharge liabilities to third parties for less than full damages, stems from European protectionist doctrines in the 17th century. Its origins, nature and procedures illustrate why the courts have always held that it pertains to remedy, and that the statutes of the forum relating thereto are applicable exclusively, regardless of where the substantive obligation may have originated.

The first United States statute in 1851, patterned after the English as it then stood, was intended to put American shipping on a basis of equality with that of foreign nations, and to encourage investors in shipping so that this branch of enterprise, in which the corporate form was not then common, might afford the same limited liability benefits as corporate investments such as "mining and manufacturing". *Norwich & N. Y. Trans. Co.* v. *Wright* (1872), 13 Wall. 104, 121.

The principle is that "full indemnity, the natural

[2] The question in respect of the law applicable to limitation upon shipowners' liability in cases involving foreign collisions was determined on exceptions in *The Titanic* (1914), 233 U. S. 718; *The Mandu* (C. C. A. 2nd 1939), 102 F. (2d) 459; *Royal Mail Steam Packet Co.* v. *Companhia de Navegaco Lloyd Brasileiro* (E. D. N. Y. 1928), 31 F. (2d) 757; and in *The State of Virginia* (E. D. N. Y. 1894), 60 F. 1018. Each case held for the law of the forum.

right of justice, shall be abridged for political reasons". *The Amalia* (1863), 1 Moo. P. C. N. S. 471, 473.

Following the "Morro Castle" fire in 1934 the Congress reflected a stiffened public policy as regards shipowners' limitation, and provided a minimum fund of $60 per gross ton for death and personal injury claimants; it expressly extended the limitation benefits to foreign shipowners, and made the masters' privity or knowledge as to unseaworthiness imputable to owners so as to defeat the right to limit.[3] This is to protect the lives of those who sail the seas.

All systems of limitation stem from the same origins, but the formula for determining the limitation fund varies with the forum. The United States statutes provide a greater benefit to shipowners when their vessel is a total loss or seriously damaged, but the Belgian law would afford a greater benefit if, as in the case of the "Norwalk Victory", she is undamaged; in either event, the United States statutes now provide the greater guarantee to death and injury claimants.

II.

Procedures on limitation of liability in the United States, in England, and in Belgium, whose law is patterned after that in England today, all reflect the remedial nature of limitation. Before limitation of liability becomes of practical consequence, the shipowner's liability must first be determined under applicable substantive law. If the damages for which the shipowner must respond exceed the amount of limitation as fixed by the formula of the forum, then

[3] Public No. 391, 79th Cong., August 29, 1935; 49 Stat. 960, 46 U. S. C. 183.

proceedings analogous to bankruptcy, or a creditors' bill, avail to the owner of the guilty ship a remedy whereby damage claims are filed and proved. The limited fund is then distributed *pari passu*, and the judgment debtor is discharged.

III.

That limitation of liability affords a remedy and is governed exclusively by the law of the forum has been settled in the United States for many years, and no foreign system has ever been superimposed. In *The Titanic*, 233 U. S. 718, Mr. Justice Holmes drew the distinction between substantive rules of collision liability, governed by the *lex loci delicti*, and limitation upon that liability, controlled by the *lex fori*. *The Titanic* involved a high seas collision of that British ship with an iceberg, and the *lex loci delicti* was considered the law of the flag; yet the shipowner, in a United States forum, was held subject to the United States limitation statutes as pertaining to a matter of remedy.

Because the "Titanic" was a total loss, the United States statutes favored the shipowner; in the instant case the "Norwalk Victory", undamaged by the collision, would be favored by foreign limitation law. The shoe is simply on the other foot, but the law of *The Titanic* remains applicable; for like holdings, see *The State of Virginia* (E. D. N. Y. 1894), 60 F. 1018 (British ship stranded in British territory); *Royal Mail Steam Packet Co.* v. *Companhia de Navegaco Lloyd Brasileiro* (E. D. N. Y. 1928), 31 F. (2d) 757 (Collision between British and Brazilian vessels in Belgium); *The Mandu* (C. C. A. 2nd 1939),

102 F. (2d) 459x (Collision between Brazilian and German vessels in Brazil); RESTATEMENT, CONFLICT OF LAWS, §411.

IV.

The Court of Appeals was correct in affirming the order of the District Court which dismissed the petition for limitation because it sought to invoke an inapplicable foreign law pertaining to the remedy. However, the reasons stated in the intermediate court's opinion do not meet the respondents' exceptions, which go to the conflict of laws question. The court below erred in assuming that petitioners could plead as if a fact (binding on exceptants) that the Belgian limitation of liability law attaches to the right. That is a conclusion of law, is not properly pleadable as a fact, and is the basis for exceptions under General Admiralty Rule 27. *The Titanic* and all other conflict of laws cases on limitation of liability, similar to the case at Bar, arose and were decided on exceptions.

V.

Petitioner, United States of America, has specified as error the fact that the court below did not in so many words hold that the Government is not required to post a bond or stipulation in limitation of liability proceedings. No bond was required of the Government, no exceptions were taken to it not filing a bond, the fact that no such bond is required was conceded below, and the specification has no place in the debate. The United States is only a nominal party here. However the exceptions were properly

applied to it because the petitioner sought to invoke an inapplicable foreign remedial law, wholly apart from any question as to the sufficiency of Black Diamond's bond.

VI.

If petitioners have been denied a *forum concursus*, it is of their own, and not of the courts', making. At best petitioners could only obtain, in a limitation proceeding in the United States, a concourse of claims asserted in the United States. This they have anyhow, because cargo claimants (respondents here) have all joined in one suit in admiralty against petitioners. Our courts cannot restrain foreigners in proceedings abroad, and this was observed by the Court in *The Titanic*. The only other suit so far reported after almost two years is that pending in England on behalf of the "Mirganser" hull interests, and there Black Diamond voluntarily appeared, although its vessels do not trade to English ports, and posted bail of $1,000,000. If Belgian limitation law attached to the right, as petitioners here argue, the bail in England would obviously not have exceeded $325,000, the limit under both English and Belgian limitation statutes. Further, if petitioners really had desired a *forum concursus*, so far as a United States court could give it, Black Diamond should have posted a bond in the District Court in the sum of $1,000,000, as required by United States law; instead it chose to invoke an inapplicable foreign statute and to ignore the requirements of the forum and the precedents holding the United States statutes to apply to the exclusion of foreign limitation statutes.

If equities are to be considered, those in favor of

innocent cargo claimants may not be ignored; it hardly lies in petitioners' mouths to complain that the common law right of full indemnity be abridged to an extent greater than that provided by the applicable remedial statutes and policy of the forum.

ARGUMENT.

I.

Introduction.

It has long been held that the statutes on limitation of shipowners' liability do not create a substantive right, but that they pertain to the remedy, and, *a fortiori*, that the limitation of liability law of the forum is applicable, regardless of the place where the substantive liability arose. It was on the basis of this accepted doctrine that the District Court refused to permit petitioners in a domestic forum successfully to invoke a foreign system of limitation of liability. We believe that an explanation of the nature and history of limitation of shipowners' liability will make evident the soundness of the rule that if petitioners are entitled to any limitation upon their liability, it must be under and pursuant to the statutes of the forum.

The Nature and Origins of Limitation of Liability:

Limitation of shipowners' liability is a legislative concession predicated upon domestic policy. If a shipowner can show freedom from personal fault or privity, he may be allowed to discharge his liabilities, stemming from negligent navigation or management of his vessel, by paying into court a fixed sum, measured by the size or value of the vessel.

The measure of the limitation fund varies according to the statute of the forum.

The theory of such limitation has been called "singular" and "*sui generis*".[4] Although it has been said that the principle stems from time immemorial, and is therefore to be considered as if deriving from the general maritime law, it seems more accurate to state that it is a singular creature of municipal legislation. Marsden, in his classic work on *Collisions at Sea* (9th ed. 1934), points out that its origins cannot be traced to the Roman law, or to any of the mediaeval maritime codes, which recognized, as to liability for collision, the principle of full indemnity as the natural right of justice. *Id.* pp. 161-163; *The Main* v. *Williams* (1894), 152 U. S. 126. His well-documented volume has traced the origins to protectionist doctrines in the early 17th century. Limitation laws then appeared in Holland and other continental nations, and followed much later in England and the United States.

The History and Purpose of the United States Statutes:

Massachusetts, in 1818, and Maine, in 1821, enacted legislation on limitation of shipowners' liability, patterned after the original British Act of Geo. 2 (1734). The Congress, however, was not prompted to pass a federal statute until after the Court, in 1848, decided *The Lexington* (*New Jersey Steam Navigation Co.* v. *Merchants Bank*), 6 How. 344. The owners of the "Lexington" were held liable for the full value of a shipment of currency, although the nature of the cargo had not been disclosed to them

[4] MARSDEN, COLLISIONS AT SEA (9th ed., 1934), p. 164; *The Nevada* (C. C. A. 9th, 1936), 81 F. (2d) 744.

by the shipper. This is said to have caused great uneasiness among shipowners, and in 1851, the Congress enacted a Limited Liability Act, R. S. 4282-4289, following the then British law.

Under the Act of 1851, as now amended, the owners of certain classes of seagoing vessels, if they are found free from personal "privity or knowledge" (as distinguished from the negligence of crews in the navigation and management of ships), are entitled to limit their liability to the value of their interest in the vessel and pending freights. In the United States the owners' "interest" is construed to mean the value of the vessel and freight moneys after the disaster; insurance proceeds are no part of the "interest". *The Great Western* (1886), 118 U. S. 520. Where the limitation fund is inadequate to satisfy all damage claimants, an additional fund of $60 per ton has been required since 1935, in respect of death and personal injury claims.[5]

The principle of limitation of shipowners' liability, which is in derogation of the common law right of full indemnity against tort-feasors, was intended originally to promote the national merchant marine of the country adopting the theory. With such purpose, the British statutes, until 1854, denied the privilege to foreign ships; however, in the United States the Court held, in 1882, that the Act of 1851, being general in its terms, applied to all owners of vessels, whether American or foreign, without distinction or discrimination.[6] To remove any further possible

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[5] 3 BENEDICT, ADMIRALTY (6th ed. 1940) §§476-478; ROBINSON ON ADMIRALTY (1939), p. 879, n. 16.

[6] MARSDEN, COLLISIONS AT SEA, p. 166; *The Scotland* (1882), 105 U. S. 24, 30.

doubt, the Congress in 1935, expressly extended the law to owners of foreign ships.[7]

As each maritime nation adopted some form of limitation of liability, it is obvious that fears of reprisal, or the interests of comity, compelled maritime nations to extend to foreign shipowners the same benefits in respect of limitation of liability as were extended to their own; all were put on an equal basis before the same forum.

In *Norwich & N. Y. Trans. Co.* v. *Wright*, (1872), 13 Wall. 104, Mr. Justice Bradley pointed out that the great object of our limitation law was to encourage "shipbuilding and to induce capitalists to invest money in this branch of the industry" (p. 121). Comparing the unlimited liability of the shipowner, prior to the Act of 1851, with other business enterprises, the court observed that many enterprises, such as mining and manufacturing, would not attract private investors unless there were available "corporate institutions by which they are exempt from personal liability, or from liability except to a limited extent". The shipowners, the Court indicated, were entitled to the same advantages as a matter of the "public interest" (p. 121).

Until the latter 19th century, it was, of course, common for individuals, often the captains themselves, to own one or more sailing vessels. Frequently ownership was divided among a group on a share or partnership basis.[8] Corporate ownership of ships was a rarity; outright Government subsidies and the preferred ship mortgage were then unavailable. Today all this has changed, and the original purposes of

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[7] Public No. 391, 74th Cong., August 29, 1935; 49 Stat. 960, 46 U. S. C. 183.

[8] See I Parsons, Maritime Law (1859), Ch. IV.

limitation of liability, as a national subvention, are archaic.

Now limitation of liability is described merely as the shipowner's "first line of defense".[9] The corporate device, preferred ship mortgages, and operating and construction subsidies afford the chief inducements to investment in and operation of an American Merchant Marine.[10]

> "A cautious shipowner may incorporate each ship as a separate venture, charter her to an independent chartering agency, mortgage her to a financial company and in other ways familiar to all types of enterprise obstruct the path of the creditor" (3 Benedict, op. cit. *supra*, 544).
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> * * * *
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> "Where the whole assets of the company consist of the ship that does the damage, and she is sunk in collision, the injured party is without redress" (Marsden, *supra*, p. 181).

A change of public policy with regard to limitation of shipowners' liability was evidenced in the United States following the disastrous "Morro Castle" fire,[11] Just as the loss of the "Lexington", in 1848, prompted the Congress to enact its first limitation of liability statute, in 1851, so the loss of the "Morro Castle", in 1934, prompted a reconsideration of the statute. It enacted the amendments of 1935 and 1936 which require a shipowner, in cases of loss of life and bodily injury, to respond up to $60 per gross ton of the

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[9] 3 BENEDICT, ADMIRALTY (6th ed.), p. 647.

[10] Ship Mortgage Act, 1920, 46 U. S. C. 911, *et seq.*; Merchant Marine Act, 1936, 46 U. S. C. 1151-1182.

[11] ROBINSON, ADMIRALTY, p. 880, n. 17; 3 BENEDICT, ADMIRALTY (6th ed.), p. 316.

vessel involved, and require as a further condition of the right to limitation in such cases, that the shipowner prove not only its personal freedom from "privity or knowledge", but also that of the vessel's master. By these amendments (expressly made applicable to domestic and foreign shipowners alike), it was made plain that the Congress intended to "increase the protection of the lives of persons traveling on vessels which sail the high seas, but * * * also leave undisturbed the position which cargo claimants have held since the enactment in 1851 of the original Limitation of Liability Act". *Report of the Senate Commerce Committee*, No. 2061, 74th Cong., 2nd Sess., p. 3 (May 1936).[12]

No distinction is made in our statutes on limitation of liability between American or foreign vessels, or the place where the obligation sought to be limited may arise.

English Statutes:

As the American law is derived from the early English statutes, some consideration of them seems pertinent. The germ of the theory is first evidenced in England in 1734, when the Act of Geo. 2, c. 15, was passed. It limited shipowners' liability for loss of cargo, by theft of the master or crew, to the value of the vessel and her freights. Limitation of liability was extended in England to cases of collision by Act of 53 Geo. 3, c. 159 (1813), and the British statutes are recognized as the forerunners of the earliest American legislation on the subject. *The Main* v. *Williams*, *supra*. The preamble of the English act

[12] The laws of some foreign countries provide no such minimum fund, and all responsibility is avoided if the ship is a total loss. See 3 BENEDICT, ADMIRALTY (6th ed.), pp. 643-647.

of 1813 shows that limitation of liability was founded upon considerations of policy, and not of justice. "The principle of limited liability is that full indemnity, the natural right of justice, shall be abridged for political reasons", said Dr. Lushington, in *The Amalia* (1863), 1 Moo. P. C. N. S. 471, 473.

The British Act of 53 Geo. 3 confined the benefits of limited liability to British ships. Since 1854 the benefits have been extended to shipowners, whether British or foreign.[13]

In England, since 1854, in those cases where the remedy of limitation is available to owners, liability may be limited to £8 per ton, with an additional fund of £7 for loss of life and personal injury claims. If the £7 fund is inadequate to satisfy liabilities for death and personal injury, then such claimants rank, as to any excess, *pari passu* with the cargo claimants in distribution of the £8 fund.[13a]

The Brussels Limitation of Liability Convention of 1924 (Belgian Law):

In the shipowners' petition filed with the District Court, it is alleged that the Belgian law on limitation upon shipowners' liability "is the International Convention for the Unification of Certain Rules of Law Relating to the Limitation of the Liability of the Owners of Seagoing Vessels, which was signed at Brussels on August 25, 1924, and ratified by Belgium on June 2, 1930" (R. 6) (See Appendix, p. 49).

Neither the United States nor England has ratified or adhered to the Convention, and it may be noted

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[13] MARSDEN, COLLISIONS AT SEA (9th ed.), pp. 165, 166; CARVER, CARRIAGE OF GOODS BY SEA (8th ed. 1938), p. 38.

[13a] MARSDEN, *op. cit. supra*, p. 179.

that in the United States at least the minimum guarantees to personal injury and death claimants are considerably higher ($60 per ton) than those afforded by the rule of the Convention ($28 per ton). It is noteworthy that Article 12 of the Convention reserves the right of the Contracting States not to apply the Convention rules in favor of the nationals of a non-contracting State. In the instant case, it is therefore at least questionable whether even a Belgian court would enforce the Convention rule in favor of the American "Norwalk Victory".

It may be observed, further, that while the great objective of the Convention was to establish uniformity in each forum, particularly with regard to the amount of the limitation fund, it has failed in this objective. By Article 15 of the Convention, each contracting State reserved to itself the right to convert the sums stated by the Convention in pounds sterling into terms of its own monetary system, in round figures. Belgium converted £8 per ton into 1,400 francs per ton, and all other contracting countries converted the limitation sum into terms of their own currencies at then current rates of exchange. With the complete unstabilization of currencies following World War II, the actual measure of limitation now varies sharply from State to State, with absurd results. This unanticipated weakness in the Convention prompted the Comité Maritime International, which conceived the Convention rule, to convene at Antwerp in September, 1947, and reconsider the Convention. No practical formula for attaining uniformity was evolved. The consensus was that "the only standard which can be adopted for the purpose of equiparating limits of liability is that

which is hoped will ultimately be achieved by the International Monetary Fund".[14]

Since, by its own terms, the Brussels Convention of 1924, alleged by petitioners to be the law of Belgium, need not be applied in favor of the nationals of a non-contracting State, it seems clear that even had the owners of the "Norwalk Victory" applied for limitation of liability in Belgium, it could not be said with any assurance that the law of the Convention would have been applied in their favor.

The compelling objective of the Convention, uniformity in each forum, was, we submit, predicated at least in part on the universal assumption that each State applies the *lex fori* in matters of limitation, and the hope was for a uniform limit of liability to prevent a "shopping around" for the most favorable forum.[15] As explained above, such uniformity has not been achieved, even among the contracting States which adopted the Convention.

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[14] "The Unification of Maritime and Commercial Law through the Comité Maritime International", by Lord Justice, Sir Leslie Scott and Cyril Miller. *The International Law Quarterly*, Vol. I, No. 4, 1947.

[15] See ROBINSON ON ADMIRALTY, pp. 902-904.

II.

The procedures on limitation of shipowners' liability illustrate that limitation statutes create no substantive rights but merely afford a remedy in respect of liabilities already assumed to exist.

In holding that limitation of liability is a matter of remedy as to which the statutes and admiralty rules of the forum govern exclusively, the District Court (R. 18-19) followed a rule consistently applied by the courts of the United States for over fifty years. An examination of limitation of liability procedures will further illustrate why this has been and should be so.

American Procedure:

Procedure for limitation of shipowners' liability is governed by Rules 51, 52, 53 and 54 of the Admiralty Rules of this Court, as amended June 21, 1948. A typical situation where they come into play is illustrated by a collision such as in the case at Bar. When a vessel collides with another and causes damage to the latter and persons and property on board, the shipowner whose vessel has caused such damage is faced with a possibility of a multiplicity of suits by the respective claimants. Under the general Admiralty Rules of this Court he may, upon compliance with statutory conditions (46 U. S. C. 185), by petition invoke the jurisdiction of the Admiralty Court. A condition to the court entertaining the petition is that the shipowner deposit a bond or stipulation for the value of his interest in the vessel and her pending freight, or else transfer his interest therein to a

trustee.[16] When this is done, the court will forthwith issue an order enjoining the prosecution of all suits, will cite damage claimants to file their claims in a limitation proceeding and answer the allegations of the petition if they will.

From the above it is evident that an incident of a limitation of liability proceeding in the United States is that all claims and actions within the reach and processes of the court are consolidated, and to that extent a multiplicity of actions may be avoided. If the petitioner's vessel is found at fault on the merits by the Admiralty Court under the substantive rules of collision liability appplicable to the case, then the next question for determination by the court is whether the petitioner has proved his freedom from personal "privity or knowledge" (as distinguished in the negligence of his servants), so as to be entitled to limit. If he sustains this burden of proof, he is entitled to a decree limiting his liability.

Whether a shipowner qualifies for limitation of liability, so that he may discharge his liabilities at less than full value, is of real importance only after his negligence has been established under the applicable substantive law. Thus it is that the petitioner prays (1) for exoneration from liability; failing which he begs (2) limitation of liability (R. 8-9).

If the shipowner obtains exoneration under the applicable substantive law after trial on the merits, that, of course, ends the entire case. If, on the other hand, he is found liable but nevertheless entitled to a limitation upon his liability, then the damage claimants must prove their claims before a commissioner. If the damages exceed the amount of the limitation fund,

[16] A bond is waived where the Government is involved. 46 U. S. C. 743; 28 U. S. C. 2408.

it is prorated among the damage claimants, and the petitioner is discharged from further liability.

English Procedure:

The English procedure points up the remedial nature of limitation of liability even more clearly. In England, liability must first be determined on the merits in court, or else confessed by the shipowner, before a limitation proceeding may be instituted.[17] Testimony is then heard and determination made by the court as to whether the shipowner is entitled to limitation upon the liability already established, and this depends on a finding, as in the United States, that he is free of personal or "actual fault or privity" as distinguished from the fault of his servants. If the determination is in petitioner's favor, the matter is referred to a Registrar, who, after due advertisement, receives and evaluates the claims, much as would a Referee in Bankruptcy. The Registrar's report is submitted to the Judge, and if approved, an order is entered directing the limitation fund to be prorated among the damage claimants.[18]

Belgian Procedure:

The Belgian procedure is further illustrative. When a collision occurs and Belgian jurisdiction is invoked, one of the shipowners applies immediately to the Tribunal de Commerce for the appointment of an "expert" to investigate the facts of the collision and report thereon to the Court. The "expert" is a member of the "Commission Nautique du Tribunal",

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[17] See *Norwich Co.* v. *Wright* (1872), 13 Wall. 104, 118; *Hill* v. *Andus* (1855), 24 L. J. Ch. 229, 231.

[18] Roscoe's Admiralty Practice (5th ed.), at p. 237, *et seq.*; Williams and Bruce, Admiralty Practice (3rd ed.), pp. 377-388; Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), §§502-509.

usually a former sea captain, and is an officer of the court. The nautical expert inspects the vessels, surveys the damaged cargo, evaluates the damage, examines witnesses, and thereafter submits his report and opinion as to the cause of the collision and the extent of damages. The report is not binding, but naturally carries great weight with the court.

The shipowner whose vessel has been declared free of fault by the nautical expert then obtains issuance of a writ against the guilty vessel, whose owner puts up a bond or a bank guaranty for the full amount of the damage, with a proviso, however, that such bond or guaranty is subject to reservation of the owner's right to claim limitation of liability. Pleadings are then filed (points of claim and defense), and the case is argued before a Judge of the Tribunal de Commerce on the basis of the evidence contained in the nautical expert's report.

Upon judgment being rendered by the court, for the full damages, the unsuccessful party, if the damages are in excess of the amount he would have to pay in case he were allowed to limit, applies to the court and asks that a trustee or liquidator be appointed. The liquidator is furnished with a list of known claimants or creditors, and at the same time the owner deposits with the liquidator the amount to which he may limit his liability, plus interest to date, plus costs of the liquidator.

If any of the claimants are of the opinion that the owner does not have a right to limit, they may apply to the court and ask that the question be determined. The burden is on the claimant to show that the owner was guilty of personal fault (cf. "privity or knowledge" under American law, and "fault or privity" under British law, with the burden on the shipowner).

If, as is usually the case, the shipowner is held entitled to limitation upon the liability already determined to exist, then the liquidator proceeds precisely as under Bankruptcy procedure in Belgium, and publishes a notice in the official journal calling upon all claimants to file and prove their claims within a certain time. The fund is apportioned between the claimants, and the debtor is then discharged.[19]

All Procedures Illustrate Limitation as a Remedy:

Regardless of the forum, whether American, British, or Belgian, the procedures for limitation upon shipowners' liability stamp it indelibly as a matter of remedy. Before limitation comes into effective play, the petitioner must have been found liable under the applicable substantive law creating the liability, and if the full damages for which a shipowner has been found liable exceed the amount to which he may be entitled to limit his liability, then the remedy of limitation upon that liability becomes important, and follows as in a creditors' bill or bankruptcy.

[19] The Belgian procedure outlined above was ascertained by personal consultations with three active maritime lawyers of Antwerp, examination of the Belgian statutes, and perusal of the Court records in the case of *Cie. Maritime Belge (S. S. Persier)* v. *S. S. Baron Blythswood*, Tribunal de Commerce, Antwerp, 1939.

III.

The rule that limitation upon liability affords a remedy governed by the law of the forum is distinct from the rule that *lex loci delicti* controls in the determination of liability; and limitation of liability should not be confused with statutes creating rights unknown to the common law and which by their terms limit the right thus created and the remedy attached to it.

It is important that distinction be made between the conflict of laws rule with respect to liability for tort, generally governed by the *lex loci delicti*, and the rule applicable to limitation of liability, which is quite another thing. The distinction is recognized in the RESTATEMENT, CONFLICT OF LAWS, sections 409 and 411:

> "Sec. 409. Liability for an alleged tort caused by collision in the territorial waters of a state is governed by the law of that state."
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> * * * * *
>
> "Sec. 411. The limitation of liability in a maritime cause of action is determined by the law of the forum irrespective of the law which created the cause of action."

A case which graphically illustrates this point is *The Mandu* (C. C. A. 2nd 1939), 102 F. (2d) 459. There a Brazilian steamer and a German steamer collided in Brazilian waters. The first question was whether, if both vessels were at fault, the Brazilian law of apportioning liability in accordance with degree of fault, or the American rule of dividing the dam-

ages equally, should be applied. As to that, the court said:

> "Liability for tort if caused by collision in the territorial waters of a foreign country is governed by the laws of that country. *Smith* v. *Condry*, 1 How. 28, 11 L. Ed. 35; Restatement of Conflict of Laws, section 409. That law not only determines the existence of liability, but also generally determines the measure of it" (p. 463).

The second question in the case was: What law should govern as to limitation of liability? Holding for the law of the forum, Judge Patterson said in the opinion:

> "But on limitation of liability in maritime cases the statutes permitting limitation are regarded as relating to remedy, and the law of the forum controls. *The Titanic*, 233 U. S. 718. * * *, Restatement of Conflict of Laws, Section 411; * * * the extent of the liability will in no event exceed what is proper under * * * the law of Brazil (Collisions Convention) * * * and the Mandu's right further to limit liability, if any, will be decided according to our own statutes on the right of a shipowner to limit his liability" (p. 463).[20]

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[20] The so-called Brussels Convention on Limitation of Liability, 1924, should not be confused with the Brussels Collisions Convention, 1910. Belgium has adopted both Conventions; the United States neither; and England has adopted the Collisions Convention but not the Limitation of Liability Convention. Under Belgian collision law, incorporating the rules of the Collisions Convention, in mutual fault cases liability is determined in proportion to degree of fault, viz., vessel A may recover say 40 per cent of her damages from vessel B, and vessel B will recover 60 per cent from vessel A, and fault in like degree is imputed to cargo on each vessel. Under the substantive rules of collision

[Footnote continued on following page.]

In the instant case, the conflict of laws question on limitation of liability is in substance the same as was certified by the Circuit Court of Appeals in *The Titanic*, 209 Fed. 513. The tragic facts giving rise to that case are too well remembered to require a telling here. Because the "Titanic" was a total loss, her owners enjoyed a decided advantage by raising the limitation umbrella in the United States. Consequently, when the "Titanic" owners sought the American forum and petitioned for limitation of liability, the record claimants, one British and one American, strenuously asserted that the British law should govern. They argued that a collision of a British ship with an iceberg on the high seas could involve no law but that of the flag of the ship; it was exactly the same, they said, as if the collision had occurred in British territorial waters, and the *lex loci* was the law of England. So, in *The Titanic*, the District Court said:

> "If the owners of the 'Titanic' under these circumstances can obtain a limitation of their li-

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[Footnote continued from preceding page.]

liability in the United States, if both vessels are to blame, damages are divided regardless of degree of fault. *The North Star* (1882), 106 U. S. 17. And in the United States innocent cargo may recover in full from the guilty non-carrying vessel, which recoups half of those damages from the carrying ship. *The Chattahoochee* (1899), 173 U. S. 540. *The Mandu*, cited *supra* in the text, applied the foreign *lex loci delicti* (which was the law of the Collisions Convention) in the determination of substantive collision liability and damages, and the *lex fori* in respect of limitation of liability.

Article 10 of the Collisions Convention expressly reserves that "the provisions of this Convention shall not affect in any way the rules in force in each country with regard to limitation of shipowners' liability, * * *." *Hearings on Brussels Collisions Convention, Subcommittee of the Committee on Foreign Relations, United States Senate*, January 10-14, 1938, p. 10; 6 BENEDICT ON ADMIRALTY (6th ed. 1941), p. 5.

ability in this Court, they could have obtained it if she had foundered in the harbor of Southampton, immediately after she started on her voyage, and while still undoubtedly within the territorial jurisdiction of England" (209 F. at p. 512).

It was on the premise that the "Titanic" might as well have foundered in British territorial waters that the case was argued and determined. This assumption is in accord with the general rule of maritime law "that tort liability on the high seas is determined by the law of the flag". *Sonneson* v. *Panama Transport Co.* (N. Y. Court of Appeals, November 24, 1948), 120 N. Y. L. J. No. 108, p. 1; and see *O'Neil* v. *Cunard White Star* (C. C. A. 2nd 1947), 160 F. (2d) 446, 448; RESTATEMENT, CONFLICT OF LAWS, Sec. 406; ROBINSON ON ADMIRALTY, pp. 238-239. There is, therefore, no distinction in law to be drawn between *The Titanic* and the instant case, merely because there the collision occurred on the high seas whereas here it was in Belgian waters.

Mr. Justice Holmes, speaking for the Court in *The Titanic*, met the specific question: "Will the courts of the United States in such a proceeding enforce the law of the United States or of the foreign country in respect to the amount of such owner's liability?" He answered that the American statute should govern.

The Court brought in focus the sometimes overlooked distinction between substantive obligations founded upon foreign law, and limitations upon the remedy incident to enforcement of such obligations in a local forum. It pointed out that limitation of shipowners' liability "does not impose, but only limits, the liability—a liability assumed already to exist on

other grounds", and held for the law of the forum (p. 733).

The Titanic is not lightly to be dismissed, as the Government's brief would have it, as distinguishable from the case at Bar. The ultimate question, as here, was whether the foreign limitation statutes of the *locus delicti* or those of the forum govern. There is no distinction in the principle merely because in *The Titanic* the shipowner contended the statutes of the forum applied, and damage claimants contended for the *lex loci delicti*; whereas in the instant case the shipowners contend for the *lex loci delicti*, and damage claimants contend for the law of the forum. Here the shoe is simply on the other foot. Surely had the American "Norwalk Victory", rather than the British "Merganser", become a total loss following the collision, petitioners would be the first to invoke the greater benefits in those circumstances available under the United States statutes.

The Court made it quite clear in *The Titanic* that the limitation of liability statutes announce "a general policy" for the administration of justice in maritime cases governing all suits that are brought in the courts of the United States (233 U. S. at pp. 733-734).

The much quoted case of *The Scotland* (1882), 105 U. S. 24, arose out of a collision between "The Scotland", a British ship, and the "Kate Dyer", an American ship, on the high seas. The trial court found the British owners wholly at fault, and the question then arose whether they could limit their liability to the value of the vessel (which was zero) and a few thousand dollars in freight moneys in accordance with American law, or whether the British statute, with

its higher limit, measured by tonnage, should apply. The Court held that the American statutes on limitation of liability govern. In his opinion, Mr. Justice Bradley covered a wide scope of hypothetical collision situations. Having reference to substantive rules of collision liability, as this Court later made clear, Mr. Justice Bradley said in the opinion:

> "* * * if a collision should occur in British waters, at least between British ships, and the injured party should seek relief in our courts, we would administer justice according to the British law, so far as the rights and liabilities of the parties were concerned, provided it were shown what that law was" (p. 29).

Then, turning to the American limitation of liability statute, the Court said:

> "The Act of Congress creating a limited responsibility of shipowners in certain cases, * * * is general in its terms, extending to all owners of vessels without distinction or discrimination. * * * This statute declares the rule which the law-making power of this country regards as most just to be applied in maritime cases (p. 30). * * *"
>
> "Of course the rule must be applied, if applied at all, as well when it operates against foreign ships as well as when it operates in their favor" (p. 31).
>
> "* * * And public policy, in our view, requires that the rules of the maritime law, as accepted by the United States, should apply to all alike, as far as it can properly be done. * * * That rule (limitation of liability) and the mode of enforcing it are equally applicable to all. They are not restricted by the terms of the statute to any nation-

~~ality or~~ domicil. We think they should not be restricted by construction" (p. 33).

This simply means, as Mr. Justice Holmes indicated in *The Titanic*, that while obligation founded upon a foreign tort may involve rights which our courts will enforce under the rule *lex loci delicti*, nevertheless the privilege of allowing a limitation of liability is a matter of public policy governed by our own limitation of liability statutes. If the law of the forum is to control in one case, it controls in all, whether it is more, or less, favorable as compared with foreign statutes.

If further evidence of the holding in *The Scotland* were required, it is afforded by Judge Benedict's decision in *The State of Virginia* (E. D. N. Y. 1894), 60 F. 1018, which was decided two years later. The "State of Virginia" was a British vessel which stranded and became a total loss in British territory, and the court held the limitation statutes of the United States to be controlling.

In *La Bourgogne* (1908), 210 U. S. 95, the collision was between a British ship and a French ship on the high seas. Claims were allowed under French law for the death of passengers of the guilty French ship, but the American limitation statute was applied. The case illustrates the applicability of the remedy of the forum in respect of an obligation founded upon a foreign tort.[21]

[21] And see: *The Thingvalla* (C. C. A. 2nd 1891), 48 F. 764 (Collision between two Danish ships on the high seas); *The Norge* (S. D. N. Y. 1907), 156 F. 845 (Loss of Danish ship on high seas); *The Edmund Fanning* (Loss of Government-owned American ship and her cargo in Italian port March 13, 1947; the American limitation of liability statutes here have been invoked by the Government without question; now pending in the Southern District of New York, No. A. 152-42).

In dismissing the petition of the owners of the "Norwalk Victory" in the instant case, Judge Inch cited, as controlling, *The Titanic*, and the decision of Judge Campbell in the Eastern District of New York in *Royal Mail Steam Packet Co. v. Companhia de Navegaco Lloyd Brasileiro* (E. D. N. Y. 1928), 31 Fed. (2d) 757. In the latter case, collision occurred in the Scheldt River, Belgium, between a British steamer and a Brazilian steamer. Judge Campbell sustained exceptions to the allegation of the Brazilian shipowner that it was entitled in the United States court to the benefit of the Belgian limitation of liability law. He said:

> "* * * while the rights and liabilities of the parties will be determined in accordance with the law of the foreign country, the right to limit liability will be controlled by the limited liability statute of our country, which will be applied to foreign ships and foreign collisions. *The Scotland*, 105 U. S. 24, 26 L. Ed. 1001; *La Bourgogne*, 210 U. S. 95, 28 S. Ct. 664, 52 L. Ed. 973; *The Titanic* v. *Mellor*, 233 U. S. 718, 731, * * *.
>
> "The Limited Liability Act of the United States (46 U. S. C. A. §181-195) does not impose, but only limits, an existing liability, and is not a part of the general maritime law, but is a declaration of general policy of the United States for the administration of justice in maritime cases. It relates not to the right or liability, but to the remedy, and that is governed by the law of the forum.
>
> "It is immaterial whether the collision took place on the high seas or in the territorial waters of Belgium, as in either event our courts will limit the liability in accordance with the statutes of the United States. *The State of Virginia* (D. C.), 60 F. 1018" (pp. 758-59).

Although appeal was taken on the merits, and the lower court affirmed, there was no appeal from Judge Campbell's ruling that the Belgian limitation of liability statute could not be resorted to in a United States court. *Royal Mail Steam Packet Co.* v. *Companhia de Navegação Lloyd Brasileiro*, 55 F. (2d) 1082, cert. den. 287 U. S. 607.

Irrespective of the source of the substantive right, "it is the general policy of our admiralty jurisprudence that where a petitioner invokes the process of our courts to limit its liability, the limitation provided in the United States statutes and none other shall apply". *Gypsum Prince-Voco* (Report of Special Commissioner, S. D. N. Y.), 1945 A. M. C. 585, 591 (not officially reported).

It is contended in the Government's brief (p. 30) that "While there may be justification, as *The Titanic*, *supra*, indicates, for the forum's refusal to impose a higher foreign limitation, * * * policy considerations cannot justify refusal to apply a lower foreign limitation." We submit it would be a strange rule that would afford the owner of a guilty ship the option of two laws, that of the forum or that of the *locus delicti*, depending on which favors him most in the circumstances. The rights of innocent claimants are better served by justice than to warrant so noxious a conclusion.

Cases cited by the petitioners which have applied the substantive rules of the *locus delicti* in the determination of collision liability (as *Smith* v. *Condry*, 1 How. 28) obviously fall into quite a different category. For another, petitioners have relied upon the decision on the merits in *The Mandu* (C. C. A. 2nd 1940), 114

F. (2d) 361, but the court had already in the same case, 102 F. (2d) 459, distinguished the rule as to determination of liability and the measure thereof under substantive law, from the applicability of *lex fori* in respect of limitation of liability. Nor are the non-maritime tort cases cited by the petitioners applicable. Such cases as *Slater* v. *Mexican R. R. Co.*, 194 U. S. 120, and *Western Union Telegraph Co.* v. *Brown*, 234 U. S. 542, involved statutes which created rights unknown to the common law, and by their terms defined the nature and extent of the corresponding obligations, and the method or measure of recovery. They have no bearing on whether the obligations so created may, as a matter of domestic policy of the forum be enforced in full. They fall under the rules referred to in RESTATEMENT, CONFLICT OF LAWS, §§409, 412 and 414; cf. Id., §411.

The authorities relied upon and followed by the District Court in sustaining respondents' exceptions to the petition, which asserts a foreign limitation statute, should be upheld, and the order of dismissal should be affirmed for the reasons stated by the District Court.

IV.

The court below should have met the issues presented as did the District Court, and it was improper to assume that a supposed allegation that the Belgian law attaches to the right must be accepted as a fact in considering the exceptions; any such allegation as to the construction or effect of the foreign law is a conclusion and involves a question of law for the court to determine on exceptions.

Although the District Court squarely met the issues raised on exceptions, as did the courts in *The Titanic* and other cases where the question of applicable limitation of liability law has been involved, the Court of Appeals below left the question undecided. It construed the petition "with as favorable an eye as possible" as if it had alleged as a fact that the Belgian law attached to the substantive right (R. 26). Such allegation of "fact", the court below said, "would be conclusive upon exceptions, since it would have been an allegation as to foreign law, which is treated as an allegation of fact" (R. 26). On this assumption, the court found it unnecessary to determine the specific exceptions of the respondents.

Exceptions are governed by Admiralty Rule 27. They are in the nature of a demurrer, or plea in bar, and may be taken as to the sufficiency, competency, or relevancy of a pleading. As a general rule, it is true, exceptions confess, for the purpose of testing a pleading, facts well pleaded; but they do not confess conclusions. 2 BENEDICT, ADMIRALTY (6th ed. 1940), p. 462.

Whether a limitation statute attaches as a matter of right or pertains to the remedy is, we submit, a

conclusion, and conclusions of law are, of course, for the court of the forum to determine.

An allegation as to the construction and meaning of foreign law is not admitted by demurrer. In *Finney* v. *Guy* (1903), 189 U. S. 335, the Court said:

> "The demurrer does not admit as a fact that the construction (in the form of an averment of fact) which the pleader may choose to put upon those statutes or decisions is the right conclusion to be drawn from them" (p. 344).

The pleader is bound to set out the substance, but it is for the court to judge whether it has the effect which he ascribes. *Coronet Phosphate Co.* v. *United States Shipping Co.* (S. D. N. Y. 1917), 260 F. 846; Note 134 A. L. R. 570, 572.

The Court of Appeals erred, we submit, in assuming that petitioners properly might have alleged that the Belgian limitation law attaches as a matter of "right". If such conclusions were treated as if they were properly pleaded facts, the whole purpose of exceptions would be defeated.

We submit that the court below did not err in affirming the order of the District Court. However, the order of dismissal should be allowed to rest upon the grounds adopted by the District Court. It is significant that in every modern case relating to the conflict of laws question here presented the courts have determined the issue on exceptions.[22]

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[22] The cases are cited *supra*, p. 9, n. 2.

V.

The petition was rightly dismissed as to both petitioners on respondents' exceptions challenging the sufficiency and competency of the allegations of the petitioners who sought to invoke an inapplicable foreign remedy; it was unnecessary for the court below to state affirmatively that no bond was required of the United States, since none was posted nor required, and the question as to the bond, raised by the Government for the first time in this Court, has no place in the debate.

In its petition for certiorari (p. 7), and in its brief herein (p. 41), the Government has assigned error to the court below for allegedly failing to hold that the United States was not required to post a bond, apart from the obligation of Black Diamond to do so.

We are surprised at such specification of alleged error. No exception was taken to the fact that the Government did not post a bond; it was conceded by all parties that there was no such requirement, nor did the courts below hold otherwise.

The petition for limitation of liability recites:

> "The petitioner United States of America, being a Corporation Sovereign, asks that no bond be required of it" (fol. 11).

In our brief below (on behalf of respondents herein) we stated (p. 2):

> "No bond or stipulation was filed by the petitioner United States of America and none is required of it in view of the provisions of the Suits

in Admiralty Act, 1920 (Title 46 U. S. C. Sec. 743)."

As a matter of fact, the interests of the United States of America, a nominal party in the instant proceeding, are extremely remote. This is in effect conceded by the petitioner, Black Diamond, in its brief (p. 32). The Court may well take judicial notice of the standard bareboat charter form the United States Maritime Commission pursuant to which the "Norwalk Victory" was demised to the Black Diamond Steamship Corporation (R. 2). Under the terms of that charter Black Diamond is the owner *pro hac vice;* the vessel is operated by Black Diamond's employees and covered by required insurance for protection of the interests of the United States.[23]

Government counsel did not even participate in the arguments below. The only reason the United States is a party at all is because the "Norwalk Victory" is Government owned, albeit Black Diamond, as the bareboat charterer, is the owner *pro hac vice.* But since legal title to the vessel is in the United States, no proceedings *in rem* may properly be instituted against her, nor may she be attached. The sole recourse of damage claimants to obtain the same benefits as would derive from an *in rem* proceeding is under the Suits in Admiralty Act, 1920 (46 U. S. C., 743), whereby the United States has waived its sovereign immunity and permits suits in admiralty under principles *in rem*, to be commenced in the District of the United States where the offending vessel may be found. Respondents have resorted to that statute here

[23] 46 *Code of Federal Regulations*, §299.82 (effective September 4, 1946).

to preserve such substantive rights as they may have under principles of *in rem* liability. But it would seem an unnecessary straining of technicalities to consider this case, as a practical matter, as anything but one involving Black Diamond, chargeable as the party primarily liable, and it was so treated, with counsels' concurrence, below.

Since Black Diamond is the party primarily charged with liability, and is not itself vested with sovereign immunity, the jurisdictional objections sustained by the District Court, so far as they are based upon inadequacy of the bond filed with the limitation petition, are, we submit, well founded. Apart from any question of bond, however, the further exceptions to the petition, based on grounds that the petition seeks on its face the benefits of a foreign remedial statute, are well taken as against both petitioners. In this respect the exceptions apply to the petitioner, United States of America, as well as to petitioner, Black Diamond. See 2 BENEDICT, ADMIRALTY (6th ed.), §333.

No question having been raised on the respondents' exceptions as to the conceded privilege of the United States not to put up a bond or other security, we submit that this error specified by the Government may safely be ignored so as to avoid a confusion of the actual issues.

VI.

If petitioners are in a dilemma regarding a *forum concursus* it is of their own making for submitting voluntarily to British jurisdiction on the one hand, and for failing to comply with the rules, statutes and precedents of the United States forum on the other.

Petitioners argue that the Court of Appeals has denied them a *forum concursus*. This is not exactly true. If petitioners had really desired a *forum concursus* in respect of all claims that might be asserted against them in the United States (and there have been none except in the single suit of cargo damage claimants in the Eastern District of New York), such *forum concursus* was available to them upon timely filing of a proper petition and a bond, of petitioner, Black Diamond, in the sum prescribed by the statutes and rules of the United States forum. It would have been the petitioner's privilege, thereafter, to move for a reduction of the bond if, after hearing on that issue, the court had felt that the Belgian statute applied. Respondents' exceptions (R. 12-13) did not challenge the right of petitioners' to file a proper petition for limitation of liability under United States laws, but contested the propriety of the foreign law allegations, and the sufficiency of Black Diamond's bond.

Petitioners took a voluntary risk when they filed a petition which they knew, or should have known, did not meet the statutory requirements of the forum, already held to be applicable to limitation proceedings by this Court in *The Titanic*, and by the precedents in the very same District Court, and in the Court of Appeals for the Second Circuit.[24]

[24] The cases are cited *supra*, p. 9, fn. 2.

Petitioners refer to a potential liability to the Belgian Government for damage caused by their vessel to the river bank, a liability, over which certainly the courts of the United States and respondents here have no control. Petitioner, Black Diamond, trading regularly to Belgium, can hardly escape the jurisdiction of a Belgian Court for that liability, if it exists. No injunctive process of United States courts could prevent it. Any such claim cannot be brought into concourse here.

As the Supreme Court said in *The Titanic*:

> "We see no absurdity in supposing that if the owner of the 'Titanic' were sued in different countries, each having a different rule affecting the remedy there, the local rule should be applied in each case. It can be imagined that, in consequence of such diverse proceedings, the owner might not be able to comply with the local requirements for limitation, as it also is conceivable that, if it sought the advantage of an alien law, it might as a condition have to pay more than its liability under the law of its flag in some cases. But the imagining of such possible difficulties is no sufficient reason for not applying the statute as it has been construed, on the whole, it would seem, with good effect" (233 U. S., at p. 734).

Petitioner, Black Diamond, also urges as an alleged inequity the fact that it has already posted bail of a million dollars in the High Court of Justice of England in the suit brought against it by the owners of the "Merganser". We are advised by our English solicitors that London solicitors for the "Norwalk Victory" agreed with solicitors for the "Merganser", almost immediately after the collision, to submit to

British jurisdiction as regards claims of the respective hull interests. Such seemingly voluntary and collusive submission to British jurisdiction is hardly cause for Black Diamond now to complain of the bond there posted, or to cite it as a justification for application of a foreign limitation of liability statute in an American forum.

We have adverted to the fact that if limitation of liability attached to the right, as petitioners here urge, the British bond, in any event, would not exceed $225,000, the approximate limitation amount in England and Belgium. The very admission that bail of $1,000,000 was posted in England by Black Diamond to meet the full claimed damages of the "Morgansor" under the applicable substantive law, subject to a later right to claim limitation, completely refutes petitioners' argument that limitation attaches to the right.

If petitioner, Black Diamond, had complied with requirements of the forum with regard to limitation of liability and had posted a bond in the United States in the amount of $1,000,000, it would not be in the dilemma it finds itself. It would have had a *forum conveniens* in the United States, so far as our courts are able to provide it. This dilemma has not been imposed on the petitioners by the court below; it is of the petitioners' own making.

Petitioner, Black Diamond, seems to feel aggrieved that cargo damage claimants have not resorted "to the courts of England, Holland and Belgium open to them" but rather have invoked the jurisdiction of the United States court in respect of damages caused by a vessel of the United States (brief of Black Diamond, p. 35). Damage claimants are of many nationalities. They are neither all English, Belgian, Dutch or American but some of each nationality and others beside

As we have pointed out, damage claimants have no recourse as of right against the "Norwalk Victory" or her sovereign owner, the United States of America, except in the District Court of the United States where the vessel may be found (46 U. S. C. 743).

Where the offending *res* is sovereign owned, as here, damage claimants might well be without adequate redress if their only recourse were a suit *in personam* against limited assets of a domestic corporate lessee in a foreign jurisdiction. In any event, there can be no inequity in holding the United States itself subject to the matters of policy enacted by the Congress, nor in similarly holding petitioner, Black Diamond, subject to the laws of its own country. If equities are to be considered, those in favor of innocent cargo owners and other injured third parties may not be ignored.

Conclusion.

It is respectfully submitted that on principle, precedents and public policy the order dismissing the petition on respondents' exceptions to the petitioners' foreign law allegations and the adequacy of Black Diamond's bond should be affirmed, for the reasons stated by the District Court.

Respectfully submitted.

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December, 1948.

APPENDIX.

1. United States Statutes:

The pertinent sections of the United States Code on limitation of shipowners' liability are as follows:

Title 46 U. S. Code §183:

"(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

"(b) In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $60 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $60 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion, so increased, is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

"(c) For the purposes of this section the tonnage of a seagoing steam or motor vessel shall be

her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage. * * *"

"(d) The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.

"(e) In respect of loss of life or bodily injury, the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel."

* * * * *

(Act March 3, 1851, 9 Stat. 635, as amended August 29, 1935, 49 Stat. 960, and June 5, 1936, 49 Stat. 1479.)

Title 46 U. S. Code §185:

"The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit

of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease."

(Act March 3, 1851, 9 Stat. 635, as amended June 5, 1936, 49 Stat. 1480.)

2. Brussels Convention on Limitation of Liability, 1924:

The Convention has been adopted by Belgium and incorporated into its municipal statutes by Law of 28 November, 1928, effective 11 January, 1929, Code de Commerce, Livre II, Titre Ier, published in *Le Moniteur Belge*, 11 January, 1929. The English text of the Convention is in 6 Benedict, *Admiralty* (6th ed. 1941), pp. 88-91. Pertinent provisions are:

"Article 1. The liability of the owner of a seagoing vessel is limited to an amount equal to the value of the vessel, the freight, and the accessories of the vessel, in respect of—

1. Compensation due to third parties by reason of damage caused, whether on land or on water, by the acts or faults of the master, crew, pilot, or any other person in the service of the vessel;

* * * *

Provided that, as regards the cases mentioned in Nos. 1, 2, 3, 4, and 5 the liability referred to in the preceding provisions shall not exceed an aggregate sum equal to 8 pounds sterling per (net) ton of the vessel's tonnage.

Article 2. The limitation of liability laid down in the foregoing Article does not apply

(1) To obligations arising out of acts or faults of the owner of the vessel;

* * *

Article 5. * * *

Payments on policies of insurance, as well as bounties, subventions and other national subsidies, are not deemed to be accessories.

* * * * *

Article 12. The provisions of this Convention shall be applied in each Contracting State in cases in which one of the parties interested is a national of another Contracting State, as well as in any other cases provided for by the national laws.

Nevertheless the principle formulated in the preceding paragraph does not affect the right of the Contracting States not to apply the provisions of this Convention in favor of the nationals of a non-Contracting State.

* * * *

Article 15. * * *

Those Contracting States in which the pound sterling is not the monetary unit reserve to themselves the right of translating the sums indicated in this Convention in terms of pounds sterling into terms of their own monetary system in round figures." (See Table, 3 Benedict, *Admiralty* (6th ed.), p. 643.)

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and convention involved	2
Statement	3
Specification of errors to be urged	7
Reasons for granting the writ	8
Conclusion	19
Appendix A	20
Appendix B	22

CITATIONS

Cases:

American Banana Co. v. *United Fruit Company*, 213 U. S. 347	15
Anderson v. *Alaska Steamship Co.*, 22 F. 2d 532	9
Aquitania, The, 20 F. 2d 457	9, 10
Butler v. *Boston & Savannah Steamship Co.*, 130 U. S. 527	19
Canada Malting Company v. *Paterson Steamships, Ltd.*, 285 U. S. 413	16, 17
Colonial Sand and Stone Co. v. *Muscelli*, 151 F. 2d 884	9
Coryell v. *Phipps*, 317 U. S. 406	19
Cuba Railroad Co. v. *Crosby*, 222 U. S. 473	15, 18
Curtis Bay Towing Co. v. *Tug Kevin Moran, Inc.*, 159 F. 2d 273	9, 13
Defender, The, 201 Fed. 189	9
Eagle Point, The, 142 Fed. 453, certiorari denied, 189 U. S. 510, 201 U. S. 644	15
El Sol, The, 45 F. 2d 852, affirmed *sub nom. South. Pac. Co.* v. *United States*, 72 F. 2d 212	5
Fred Smartley, Jr., The, 108 F. 2d 603, certiorari denied *sub nom. S. C. Loveland, Inc.* v. *Pennsylvania Sugar Co.*, 309 U. S. 683	13
George W. Fields, The, 237 Fed. 403	9
Green, Ex parte, 286 U. S. 437	9
Just v. *Chambers*, 312 U. S. 383	19
Langnes v. *Green*, 282 U. S. 531	8, 9, 14
Larsen v. *Northland Transportation Co.*, 292 U. S. 20	13, 19
Northern Pacific Railroad Co. v. *Babcock*, 154 U. S. 190	15
Oceanic Steam Navigation Co. v. *Mellor (The Titanic)*, 233 U. S. 718	14, 16, 17
Ormsby v. *Chase*, 290 U. S. 387	15

Page

Petition of Goulandris, 140 F. 2d 780, certiorari denied sub nom. *Goulandris et al. v. Amer. Tobacco Co.*, 322 U. S. 755 13

Providence & New York Steamship Co. v. Hill Mfg. Co., 109 U. S. 578 19

Quarrington Court, The, 102 F. 2d 916, certiorari denied sub nom. *Court Line, Ltd. v. Isthmian Steamship Co.*, 307 U. S. 645 10

Royal Mail Steam Packet Co. v. Companhia de Navegaco Lloyd Brasileiro, 27 2d 1002, 31 F. 2d 757, 50 F. 2d 207, affirmed 55 F. 2d 1082, certiorari denied, 287 U. S. 607 16, 18

Scotland, The, 105 U. S. 24 17, 18

Slater v. Mexican National Railroad Co., 194 U. S. 120 15

Smith v. Condry, 1 How. 28 14

Standard Oil Co. v. Tampico Navigation Co., 21 F. 2d 795 15

Standard Wholesale Phosphate and Acid Works, Inc. v. Travelers Insurance Co., 107 F. 2d 373 13

Western Union Telegraph Company v. Brown, 234 U. S. 542 15

Statutes:

Act of March 3, 1851 (9 Stat. 635) 8

Act of June 5, 1936 (49 Stat. 1479) 12

R. S. 4283, as amended, 49 Stat. 1479, 46 U.S.C. 183, 5, 8, 9, 11, 18, 19, 20

R. S. 4285, as amended, 49 Stat. 1479, 46 U.S.C. 185, 4, 5, 8, 12, 20

28 U.S.C. 870 5

46 U.S.C. 743 5

Miscellaneous:

Admiralty Rules 51-54. 5

H. Rep. No. 2517, 74th Cong., 2d sess., p. 6 13

International Convention for the Unification of Certain Rules of Law Relating to the Limitation of Liability of Owners of Seagoing Vessels (27 Amer. Jour. of Int. Law, pp. 7, 9) 5, 22

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 130

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT STEWART & SONS, LTD., ET ALS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above-entitled case on March 29, 1948.

OPINIONS BELOW

The findings of fact, conclusions of law, and opinion of the District Court of the United States for the Eastern District of New York (R. 20-27) have not been officially reported. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 36-38) is reported at 167 F. 2d 308.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 29, 1948 (R. 39). The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a petition for limitation of a shipowner's liability, seeking a *forum concursus* in order to enable proration of an inadequate fund among various claimants, may be dismissed notwithstanding the fact that the asserted and potential claims against the petitioner are far in excess of any applicable foreign or local law of limitation of liability.

2. Whether, where the court below assumed that the smaller amount provided by the Belgian law of the situs of the collision limits the amount of recovery, that amount rather than the larger amount provided by the American law should also determine the maximum limit of liability in connection with the petition for limitation filed by the American shipowner in a United States court as a result of litigation in that court growing out of a collision between the American and a British vessel in Belgium territorial waters.

STATUTES AND CONVENTION INVOLVED

The pertinent provisions of R. S. 4283(a) and 4285 are set forth in Appendix A, *infra*, pp. 20-21.

The pertinent provisions of the International Convention for the Unification of Certain Rules of Law Relating to the Limitation of Liability of Owners of Seagoing Vessels are set forth in Appendix B, *infra*, 22.

STATEMENT

On April 28, 1947, the *Norwalk Victory*, a steamship owned by the United States, collided [1] with the British cargo vessel *Merganser* in the Schelde River in Belgian territorial waters (R. 23). The *Norwalk Victory* was at that time manned, navigated, and operated by the Black Diamond Steamship Corporation (hereinafter referred to as "Black Diamond") under bareboat charter (R. 2). As a result of the accident, the *Merganser* was wrecked and sunk, causing the loss of its cargo and the life of one of its seamen (R. 7, 23). *Merganser's* owners instituted suit against Black Diamond in the High Court of Justice of England, Probate, Divorce and Admiralty Division, claiming $1,000,000 for the loss of their vessel (R. 23), and Black Diamond was there required to post bail in pounds equivalent to the amount claimed (R. 23). Twenty of the owners of the cargo carried by the *Merganser* filed a suit on October 14,

[1] The immediate cause of the collision, apart from any question of negligent navigation of either or both ships, seems to have been the derangement of the *Norwalk Victory's* steering gear due to the fact that a four-inch piece of marline, left in the vessel's steering system at the time of construction, became lodged in a check valve and thus prevented that vessel from turning to the right in time to avert the collision (R. 4-5).

1947, in the District Court for the Eastern District of New York, against the United States and Black Diamond, asserting cargo loss claims aggregating $1,000,000 (R. 7, 15, 24). Still other *Merganser* cargo-owners (R. 8), as well as the deceased seaman's next-of-kin, have not yet brought suit (R. 7). There also is a possibility that the Belgian Government will sue for damages caused by the collision to the bank of the Schelde River (R. 8).

The United States, as owner, and Black Diamond, as bareboat charterer of the *Norwalk Victory*, filed, on October 28, 1947, a petition for exoneration from or limitation of liability in the District Court for the Eastern District of New York (R. 2-13), the court which the twenty cargo owners had chosen to institute their suit on October 14. The petition, filed in accordance with the six-month statutory period prescribed by R. S. 4285 (Appendix A, *infra*, pp. 20-21), set forth the facts concerning the collision and the various asserted and potential claims arising therefrom. Since the collision occurred within the jurisdiction and territorial waters of Belgium, the petition alleged that liability, if any, should be adjudged to be no greater than the maximum permissible under the Belgian limitation of liability law, and that such maximum sum should be prorated among the various claimants (R. 8, 12). The petition further prayed for a monition directing all claimants for damages resulting from the collision to file their claims with

the Clerk of the Court and to appear and answer the allegations of the petition; and to enjoin the prosecution of any action resulting from the collision other than in the present proceeding (R. 12).

On exceptions to the petition, the district court held that the law of Belgium as to limitation of liability is the International Convention for the Unification of Certain Rules of Law Relating to the Limitation of Liability of Owners of Seagoing Vessels (Appendix B, *infra*, p. 22), that petitioner's liability, if measured by that law, could not exceed $325,028.79,[2] even though the *Norwalk Victory* was valued at $1,000,000, and that Black Diamond had posted in court a surety bond for $325,028.79[3] (R. 23-26). However, the district court refused to apply the Belgian law and sustained exceptions by the twenty cargo owners to the petition on the ground that its allegations and the bond posted did not comply with the requirements of R. S. 4285 (Appendix A, *infra*, pp. 20-21) and the applicable Admiralty Rules,[4] and that therefore the district court could not take jurisdiction over the proceeding (R. 20, 21). The district

[2] The limitation of liability in this case, if measured by the United States laws, would amount roughly to $1,000,000, *i.e.*, the value of the *Norwalk Victory* (R. S. 4283, Appendix A, *infra*, p. 20).

[3] The United States, as owner of the vessel, is not obligated to furnish bonds in order to petition for limitation of liability. 28 U.S.C. 870; 46 U.S.C. 743; *The El Sol*, 45 F. 2d 852, 855-856 (D.C.S.D.N.Y.), affirmed *sub nom. South Pac. Co.* v. *United States*, 72 F. 2d 212 (C.C.A. 2).

[4] Admiralty Rules 51-54 govern the procedure in petitioning for limitation of liability.

court accordingly entered an order dismissing the petition "on authority of *Oceanic Steam Navigation Co. v. Mellor (The Titanic)*, 233 U. S. 718, and *Royal Mail Steam Packet Co. v. Companhia de Navegaco Lloyd Brasileiro*, 31 Fed. (2d) 757 [E.D.N.Y.], 50 Fed. (2d) 207 [E.D.N.Y.], aff'd 55 Fed. (2d) 1082 [C.C.A. 2], cert. den. 287 U. S. 607, holding that the procedures and jurisdictional requirements on limitation of liability, including provisions as to petitioner's stipulation for value, must be controlled by the Limitation of Liability Statutes of the United States where the jurisdiction of a United States Court is invoked" (R. 21).

On appeal, the court below, although stating that *The Titanic* was not to be understood to require the district court in a case of this sort to disregard the Belgian limitation of liability laws, affirmed that court's decree of dismissal without passing on the applicability of the Belgian limitation law or R. S. 4283 and the sufficiency of the bond large enough to cover the maximum liability as measured by Belgian laws but insufficient to cover the maximum liability if measured by R. S. 4283 (R. 37). The court below held that if the actual limit of petitioner's liabilities is in fact $325,000, it has no right to petition for limitation of liability and seek a *forum concursys* since its ship is worth $1,000,000. The court below further stated that if the liabilities actually exceeded $325,000, the $325,000 bond posted by Black Diamond was too small. Consequently, the court held that the ques-

tions decided by the district court were not presented by the record and could not arise unless the right of petitioner to limit liability was asserted in a defense to any suits brought against it (R. 38).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the petitioner had no right to commence a proceeding for limitation of liability.

2. In holding that the questions of the choice of the United States or Belgian laws as to limitation of liability was not presented by the record.

3. In holding that although the *lex loci delictus* controls the maximum judgment recoverable in a suit, it does not control in a petition for limitation of liability for collisions occurring in the territorial waters of a foreign nation.

4. In failing to hold that the United States was not required to post a bond, apart from the obligation of Black Diamond to do so.

5. In failing to hold that the $325,028.79 bond posted by Black Diamond was sufficient to enable the district court to maintain jurisdiction of the petition for limitation of liability.

6. In failing to hold that the district court improperly dismissed the petition for lack of jurisdiction.

7. In affirming the district court's decree of dismissal.

REASONS FOR GRANTING THE WRIT

The court below, by misapplication of well-established principles, has deprived the United States and Black Diamond of shipowner's rights, recognized by Congress ever since 1851, to file a petition for limitation of liability and thus secure the advantages of a *forum concursus* whenever the total claims against the shipowner exceed his maximum liability.[5] Moreover, the court below, as a result of its misapplication of settled law, failed to pass on the conflict-of-law problem as to the applicability of the Belgian or United States limitation of liability laws. Consequently, the holding of the court below, if allowed to stand, jeopardizes the rights of shipowners to petition for liability in cases where they clearly should be allowed to institute such a proceeding and at the same time leaves unsettled a conflict-of-law question of great importance to the shipping industry.

1. The holding below departs sharply from the policy of this Court in safeguarding against improvident dismissals of petitions for limitation of liability manifested in *Langnes* v. *Green*, 282 U. S. 531. In that case the district court was directed to refrain from dismissing such a petition

[5] R. S. 4283(a) and 4285 (Appendix A, *infra*, pp. 20-21), limiting the liability of a shipowner and authorizing him to petition for such a limitation, were derived from the Act of March 3, 1851 (9 Stat. 635).

"as a matter of precaution * * * in the possible but * * * 'unlikely event'" that petitioner might need to invoke the benefits of R. S. 4283 in the district court at some later date.[6]

a. To implement that protection so required by this Court, several cases, most of which were decided in the Second Circuit, have established the proposition that a petition for limitation is not subject to dismissal in situations where the asserted and potential claims against the shipowner aggregate an amount in excess of his maximum liability.[7] *Curtis Bay Towing Co.* v. *Tug Kevin Moran, Inc.*, 159 F. 2d 273, 276 (C.C.A. 2); *Colonial Sand and Stone Co.* v. *Muscelli*, 151 F. 2d 884 (C.C.A. 2); *Anderson* v. *Alaska Steamship Co.*, 22 F. 2d 532, 534 (C.C.A. 9); *The Aquitania*, 20 F. 2d 457 (C.C.A. 2); *The George W. Fields*, 237 Fed. 403 (S.D.N.Y.); *The Defender*, 201 Fed. 189 (E.D.N.Y.). The soundness of this proposition stems from the fact that the petition for limitation is inseparably linked with the need and right of the shipowner to a *forum concursus*, in order to consolidate all asserted and potential claims against him and thus make possible a *pro*

[6] That such a precautionary measure was aptly ordered is evident from *Ex Parte Green*, 286 U. S. 437, which was decided by this Court after the "possible but unlikely event," *i.e.*, the challenging of the petitioner's right to limit liability in the state court, had materialized.

[7] Since R. S. 4283 (Appendix A, *infra*, p. 20) generally limits the liability of the shipowner to the value of the ship, many of the cases state the proposition in terms of the total claims being in excess of or equal to the value of the ship.

rata distribution among the claimants of a fund which is insufficient to pay all claimants in full but which represents the amount of the shipowner's maximum limited liability (*i.e.*, generally the value of the ship under R. S. 4283). See *The Quarrington Court*, 102 F. 2d 916, 918 (C.C.A. 2), certiorari denied *sub nom. Court Line, Ltd.* v. *Isthmian Steamship Co.*, 307 U. S. 645. The court below, in the *Curtis Bay* case, *supra*, has held that a petition should not be dismissed even if there is only a *remote* chance that other claims might appear which would require a *pro-rata* distribution of an inadequate fund and thus make a concourse necessary. The extreme remoteness in the *Curtis Bay* case of the additional, unasserted claims may be gauged from the fact that at the time of refusal of the motion to dismiss the petition, claims aggregating only $17,000 had been asserted against a shipowner whose maximum liability was the $209,000 at which his ship was valued.[8]

The facts of the instant case, detailed above, show that cargo claims already asserted against petitioner aggregate $1,000,000, that additional cargo claims will probably be asserted, that a suit against Black Diamond, claiming an additional

[8] On the other hand, where the amount of the maximum limited liability is concededly *more* than the total amount of asserted and assertable claims, there is no doubt that the fund available for distribution is large enough to enable payment to *all* of the claimants in full. There is therefore, of course, no need for a *forum concursus* or a petition for limitation of liability in the latter case (see *The Aquitania*, 20 F. 2d 457 (C.C.A. 2)).

$1,000,000 in damages, has been instituted in the English courts, and that a still further suit to recover damages for the wrongful death of the seaman killed on board the *Merquasor* is a distinct possibility. The maximum amount of the shipowner's limited liability in the instant case, even if it were to be measured under R. S. 4283, is only $1,000,000 (*i.e.*, the ship's value). There is absolutely no doubt therefore that the total of the asserted and assertable claims far exceeds the shipowner's limited liability, whether that liability be determined under the Belgian law (*i.e.*, $325,000) or R. S. 4283 (*i.e.*, $1,000,000). The cases discussed clearly require that a petition in such a case be not dismissed.

The court below, it is submitted, confused the $325,000 figure, arrived at by taking into consideration the Belgian law of limitations of liability, with the amount of asserted and assertable claims.[9] These two amounts are, of course, not the same. The facts before the lower court demonstrated that the $325,000 figure was far less than the amount of claims involved which ran into millions of dollars. It is, of course, true that if the asserted and probable claims, rather than the maximum liability, aggregated only $325,000, there would be no need for a concourse since the ship, if valued at $1,000,000 under R. S. 4283, would have provided an

[9] No other explanation appears for the citation by the court below of *The Aquitania* and related cases in affirming the dismissal of the petition.

adequate fund to assure payment in full to all of the claimants. It would be only in such a situation, which did not obtain in this case, that a petition for limitation of liability would be properly dismissed, since such a petition presupposes that the total asserted and assertable claims, before they are limited, will probably be in excess of the liability as limited.

The alternative suggested by the court below that if "the liabilities may go beyond $325,000, on their own argument the bond they propose is too small" has two fatal defects. First, the assumption that the liability may go beyond $325,000 is not open to the court below inasmuch as it had already held that the allegation of the petition as to Belgian law must be taken as true and that as a matter of American law limits which attach to the right will be recognized. Second, the United States is exempt by law from the obligation of filing any bond (see note 3, p. 5, *supra*) irrespective of what obligation might exist in respect of Black Diamond.

b. Moreover, in affirming the dismissal of the petition, the court below would seem to intimate that in the event that other suits should be filed, the petition for limitation would be reserved, at which time it would become pertinent to determine if the bond were sufficient. That suggestion, however, completely ignores the effect of the Act of June 5, 1936 (49 Stat. 1479, 1480), which amended R. S.,

4285 (Appendix A, *infra*, pp. 20-21), so as to require the shipowner to assert his privilege to limit his liability within six months after claim has been made upon him. Where such a petition is not filed within the statutory six-months period, the shipowner cannot thereafter avail himself of its benefits. *Petition of Goulandris*, 140 F. 2d 780 (C.C.A. 2), certiorari denied *sub nom. Goulandris et al.* v. *Amer. Tobacco Co.*, 322 U. S. 755; *The Fred Smertley, Jr.*, 108 F. 2d 603, 607 (C.C.A. 4), certiorari denied *sub nom. S. C. Loveland, Inc.* v. *Pennsylvania Sugar Co.*, 309 U.S. 683; *Standard Wholesale Phosphate and Acid Works, Inc.* v. *Travelers Insurance Co.*, 107 F. 2d 373 (C.C.A. 4). Prior to the 1936 amendment, there was no time fixed within which such a petition might be filed (H. Rep. No. 2517, 74th Cong., 2d sess., p. 6), and the improvident dismissal of a petition did not then seriously prejudice the shipowner since he could come in, at any later time,[10] and file another petition. Now, however, if the six-month period has elapsed the shipowner is completely barred from instituting any limitation of liability proceeding. Recognizing this, the court below has held that it will not now dismiss such a petition, but will let it stand in the remote event that other claims should appear. *Curtis Bay Towing Co.* v. *Tug Kevin Moran, Inc.*, 159 F. 2d

[10] The shipowner, before the 1936 amendment took effect, could even wait until after judgment before petitioning for limitation. *Larsen* v. *Northland Transportation Co.*, 292 U. S. 20.

273 (C.C.A. 2); cf. *Langnes* v. *Green*, 282 U. S. 531. The petition in the instant case should, we submit, irrespective of any theory of the court below as to the alleged liability being lower than the ship's value, have been similarly allowed to stand. Such action, consistent with the reasoning of the *Curtis Bay* case, could not have possibly prejudiced the cargo-claimants and would have protected petitioner even after the six-month period had elapsed.

2. In any event, the court below should have passed upon the conflict-of-law problem presented by the record. Although the court below did indicate that it disagreed with the district court's view that *The Titanic* was dispositive of the issue in so far as it related to the substantive right, it left unanswered the question of whether the amount fixed by Belgian law could be availed of in a petition for limitation filed in a court of the United States.

a. Since the collision involved in the instant case occurred in Belgian territorial waters, there is no doubt that, as the court below correctly held, liability of the parties must ordinarily be deemed to be fixed by the law of Belgium, since that is the nation in which the tort took place. More than a century ago, this Court announced in *Smith* v. *Condry* (1 How. 28, 33):

> The collision having taken place in the port of Liverpool, the rights of the parties depend upon the provisions of the British Statutes,

then in force; and if doubt exists as to their true construction, we must of course adopt that which is sanctioned by their own courts.

This view that the law of the place of the wrong governs liability of the parties has been reiterated consistently. See *e.g.*, *Northern Pacific Railroad Co.* v. *Babcock*, 154 U. S. 190, 199; *American Banana Co.* v. *United Fruit Company*, 213 U. S. 347, 356; *Cuba Railroad Co.* v. *Crosby*, 222 U. S. 473; *Ormsby* v. *Chase*, 290 U. S. 387.

That foreign laws which limit liability are within the scope of this well-established doctrine and, therefore, should be recognized by the forum when determining the extent of liabilities for torts committed within another country is clear from prior decisions of this Court. For example, *Slater* v. *Mexican National Railroad Co.*, 194 U. S. 120, unequivocally holds that a court should not render a judgment for damages in excess of that allowed by the *lex loci delictus*. Any contrary holding it was pointed out would be unjust and would "deny the defendant the benefit of whatever limitations on his liability" he would otherwise have available (194 U.S. 120, 126). In adhering to this principle, this Court has specifically refused to allow a recovery of damages upon a theory of measurement not sanctioned by the *lex loci delictus*. *Western Union Telegraph Company* v. *Brown*, 234 U. S. 542; see *Standard Oil Co.* v. *Tampico Navigation Co.*, 21 F. 2d 795 (D.C.S.D.N.Y.); The

Eagle Point, 142 Fed. 453 (C.C.A. 3), certiorari denied, 189 U.S. 510, 201 U.S. 644. Moreover, in *Canada Malting Company* v. *Paterson Steamships, Ltd.*, 285 U.S. 413, 424, this Court has indicated, that with respect to a collision between two Canadian vessels in American territorial waters, that it was to be assumed that the Canadian courts would determine the limits of liability by measuring damages in accordance with the law of the United States.

These decisions, we submit, require not only that Belgium law govern the substantive question, but also that Belgium law be given full effect by our courts in proceedings to limit liability whenever claimants, as in the instant case, have instituted suit here on a cause of action arising completely in Belgium.

Inasmuch as the court below failed even to pass upon this proposition, much less to reject it, the only doubts cast upon the applicability of the cited holdings to the instant case are reflected in the district court's opinion dismissing the petition "on the authority" of *The Titanic* and the *Royal Mail* cases, *supra*, pp. 6-7.

But analysis of *The Titanic* decision readily demonstrates that it does not furnish support for the district court's holding. That case represented, as indicated by Mr. Justice Holmes, a voluntary relinquishment by certain claimants of the higher benefits of the English law of limitation of lia-

bility, by having recourse to the American courts. The opinion in that case emphasizes (233 U.S. 718, 732-3), that the question before the court was "only whether those who do see fit to sue in this country are limited in their recovery" irrespective of the higher amounts they could have recovered under English law had they sued in England. The instant case poses not a question of voluntary relinquishment of a right to participate in a larger limitation fund, but the problem of permitting claimants to increase the amount of their recovery by taking advantage of the higher limitation amount of R.S. 4283, and thus impose upon the shipowner a liability far in excess of that prescribed by the law of the place of the tort.

In addition, *The Titanic* is concerned with a situation where the accident had occurred on the high seas rather than within the territorial waters. In connection with collisions on the high seas, "where the law of no particular state has exclusive force but all are equal" it is natural for the forum to invoke its own law as "presumptively expressing the rules of justice." *The Scotland*, 105 U.S. 24, 29. In fact, *The Titanic*, like the later *Canada Malting* case, *supra*, does intimate that American law would apply in suits in foreign courts resulting from an accident in American territorial waters.[11] The existence of these important dis-

[11] *The Titanic* opinion indicates that R. S. 4283 "well might be held to announce a general policy governing both obligations that arise within the jurisdiction and suits that are brought" in the United States (233 U. S. 718, 733).

tinctions, it is submitted, compels the conclusion that *The Titanic* is, as indicated by the court below, not here dispositive.[12]

b. Even if R.S. 4283 is considered applicable there would appear to be no reason for denying the shipowner the further benefits of another equally applicable limitation by which his liability would be reduced to a figure *lower* than that fixed by R.S. 4283. This Court has stated that "the law of the forum is material only as setting a limit of policy beyond which" an obligation arising in a foreign country will not be enforced here. *Cuba Railroad Co.* v. *Crosby*, 222 U.S. 473, 478. There is no doubt that R.S. 4283 sets a maximum, rather than minimum limitation. It is in no way inconsistent with such a congressionally-declared maximum to invoke a supplemental and non-conflicting limitation which calls for a liability in a lesser amount.[13] Such an approach does not result in

[12] The *Royal Mail* case (27 F. 2d 1002), the other decision relied upon by the district court, if viewed as holding that R. S. 4283 measures the liabilities arising from an accident within foreign territorial waters was, we submit, wrongly decided. The decision in that case seems to have confused the question of acceptance of jurisdiction with the problem of a choice of proper laws. There seems to have been no justification for the court in the *Royal Mail* case to have overthrown the usual rule that limitation of liability is, in cases involving accidents in territorial waters, governed by the law of the situs of the accident, especially since that court relied principally on *The Scotland*, 105 U. S. 24, which, involving a collision on the high seas, expressly invoked the American law *only* because the law of no specific state has exclusive force on the high seas.

[13] This is very different from a situation where the foreign law imposes a liability in excess of that recognized by the forum. In the latter situation there may be some justification of policy for the forum to decline enforcement of the excessive foreign liability.

enforcing an obligation beyond the "limit of policy" set by the forum but is in strict accord with the fundamental purpose of R.S. 4283—to encourage investments in shipbuilding and the employment of ships in commerce. *Butler* v. *Boston & Savannah Steamship Co.*, 130 U.S. 527, 549; *Just* v. *Chambers*, 312 U.S. 383, 385. Similarly, the view here advanced is consonant with the need of "broadly and liberally" construing R.S. 4283 so as to achieve that fundamental purpose. *Coryell* v. *Phipps*, 317 U.S. 406, 411; *Larsen* v. *Northland Transportation Co.*, 292 U.S. 20, 24; *Providence & New York Steamship Co.* v. *Hill Mfg. Co.*, 109 U.S. 578, 589. Furthermore, allowing a shipowner to claim the benefit of a lower limitation prescribed by the law of the situs of the collision in those cases where the law of the forum fixes a higher limit of liability, would serve to deter the undesirable importation of foreign claims into United States courts for the sole purpose of obtaining recoveries against shipowners far in excess of those authorized by the *lex loci delictus*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JUNE 1948.

APPENDIX A

Sections 4283(a) and 4285 of the Revised Statutes, as amended by the Act of June 5, 1936 (49 Stat. 1479, 46 U.S.C. 183(a), 185) read as follows:

Sec. 4283(a). The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

Sec. 4285. The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter, as amended, and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 4283, as amended, or (b) at his option shall transfer,

for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix, as necessary to carry out the provisions of section 4283, as amended. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.

APPENDIX B

The pertinent provisions of the International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Seagoing Vessels (27 Amer. Jour. of Int. Law, pp. 7, 9) provide:

Article 1

The liability of the owner of a seagoing vessel is limited to an amount equal to the value of the vessel, the freight, and the accessories of the vessel, in respect of—

1. Compensation due to third parties by reason of damage caused, whether on land or on water, by the acts or faults of the master, crew, pilot, or any other person in the service of the vessel:

* * * * *

Provided that, as regards the cases mentioned in Nos. 1, 2, 3, 4, and 5 the liability referred to in the preceding provisions shall not exceed an aggregate sum equal to 8 pounds sterling per ton of the vessel's tonnage.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1946 764464 110

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and convention involved	3
Statement	3
Specification of errors to be urged	8
Summary of argument	9
Argument	14
Petitioners are entitled to maintain this limitation proceeding and secure a *forum concursus*	14
I. Introduction	14
A. Preliminary analysis	14
B. General background	17
II. The choice-of-law problem	23
III. The petition for limitation of liability should not have been dismissed	32
A. The necessity for proration of the limited liability fund among the present and potential claimants requires a *forum concursus*	33
B. The security posted by petitioner Black Diamond satisfies the requirements of the statute	39
C. In any event, dismissal of the petition was improper as to the United States	41
D. The petition for limitation was not prematurely filed	43
Conclusion	46
Appendix A	48
Appendix B	49

CITATIONS

Cases:

American Banana Co. v. *United Fruit Co.*, 213 U. S. 347	25, 29
American Car & Foundry Co. v. *Brassert*, 289 U. S. 261	19
Anderson v. *Alaska Steamship Co.*, 22 F. 2d 532	35
Aquitania, The, 20 F. 2d 457	23, 35
Armstrong Co. v. *Nu-Enamel Corp.*, 305 U. S. 315	40
Arum, The, [1921] Prob. 12	26
Benefactor, The, 103 U. S. 239	21
Bigler v. *Waller*, 12 Wall. 142	43
Black Diamond Steamship Corp. v. *Robert Stewart & Sons, Ltd., et al.*, No. 121, Oct. T., 1948	2

Cases—Continued

	Page
Blue Mountain, Etc., Line, The v. *Youghiogheny & Ohio Coal Co.*, 20 F. Supp. 165	24
Bright, The, 38 F. Supp. 574	46
Butler v. *Boston & Savannah Steamship Co.*, 130 U. S. 527	19, 22, 31, 33
Canada Malting Co. v. *Paterson Steamships, Ltd.*, 285 U. S. 413	27
Canley v. *McLain Line, Inc.*, 40 F. Supp. 887	45
Carpenter v. *Mary R. Mullins, Inc.*, 33 F. Supp. 10	46
Chickie, The, 141 F 2d 80	45
Christensen v. *Floriston Pulp & Paper Co.*, 29 Nev. 552, 92 Pac. 210	27
Cities Service Co. v. *Dunlap*, 308 U. S. 208	32
City of Norwich, The, 118 U. S. 468	21, 36
Colonial Sand & Stone Co. v. *Muscelli*, 151 F. 2d 884	35
Coryell v. *Phipps*, 317 U. S. 406	19, 19, 31
Coryell v. *Pilkington*, 39 F. Supp. 142, aff'd, 128 F. 2d 702, aff'd, 317 U. S. 406	45
Cuba Railroad Company v. *Crosby*, 222 U. S. 473	25, 30
Curtis Bay Towing Co. v. *Tug Kevin Moran, Inc.*, 159 F. 2d 273	35, 46
Davis v. *Wakelee*, 156 U. S. 680	43
DeCruz v. *Hiering*, 69 F. Supp. 397	46
De Pinto v. *O'Donnell Trans. Co.*, 293 N. Y. 32	45
Doris Eckhoff, The, 30 Fed. 140	36
Dowdell v. *United States District Court*, 139 Fed. 444	23, 34
Eagle Point, The, 142 Fed. 453, certiorari denied, 189 U. S. 510, 210 U. S. 644	27
El Sol, The, 45 F. 2d 852, aff'd *sub nom. Southern Pacific Co.* v. *United States*, 72 F. 2d 212	42
Empresa Agricola Chicama Ltda. v. *Amtorg Trdg. Corp.*, 57 F. Supp. 649	24
Erie R. Co. v. *Tompkins*, 304 U. S. 64	32
Fred Smartley, Jr. The, 108 F. 2d 603, certiorari denied *sub nom. S. C. Loveland, Inc.* v. *Pennsylvania Sugar Co.*, 309 U. S. 683	45
George W. Fields, The, 237 Fed. 403	35
Giddings v. *Zellan*, 160 F. 2d 585, certiorari denied, 332 U. S. 759	27
Goulandris, Petition of, 140 F. 2d 780, certiorari denied *sub nom. Goulandris et al.* v. *American Tobacco Co.*, 322 U. S. 755	45
Great Western, The, 118 U. S. 520	36
Green, Ex parte, 286 U. S. 437	44
Guaranty Trust Co. v. *York*, 326 U. S. 99	32
Hagen, The, [1908] Prob. 189	26

Cases—Continued

	Page
Hamilton, The, 207 U. S. 398	29
Hartford Accident Co. v. Sou. Pacific, 273 U. S. 207	22
Hupp Motor Co. v. Wadsworth, 113 F. 2d 827	27
Joseph O'Donnell, The, 37 F. Supp. 120	46
Just v. Chambers, 312 U. S. 383	10, 19, 31
Klaxon Co. v. Stentor Co., 313 U. S. 487	32
LaBourgogne, 210 U. S. 95	36, 39
Langnes v. Green, 282 U. S. 531	44
Larsen v. Northland Transportation Co., 292 U. S. 20	19, 31, 45
Liverpool &c. Nav. Co. v. Brooklyn Terminal, 251 U. S. 48	18, 19
Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 397	24
Long Island North Shore Passenger and Freight Transportation Co., In re, 5 Fed. 599	34
Louisville & N. R. Co. v. Lynch, 137 Ky. 696, 126 S. W. 362	27
Main, The v. Williams, 152 U. S. 122	9, 17, 18, 19, 36
Mandu, The, 102 F. 2d 459, 114 F. 2d 361, certiorari denied, 311 U. S. 715	27
Meyer, In re, 74 Fed. 881	36
M. Moxham, The, [1876] 1 Prob. 107	26
Monongahela River Consol. Coal & Coke Co. v. Hurst, 200 Fed. 711	22, 33
Moore v. American Transportation Co., 24 How. 1	19
New Jersey Steam Navigation Co. v. Merchants Bank, 6 How. 344	18
New Orleans Ins. Co. v. Albro Co., 112 U. S. 506	43
Norwich Co. v. Wright, 13 Wall. 104	19, 21
Palmer v. Hoffman, 318 U. S. 109	32
Pelham, The, 69 F. Supp. 586	23, 34
Providence & N. Y. SS Co. v. Hill Mfg. Co., 109 U. S. 578	10, 19, 23, 31, 33, 34
Quarrington Court, The, 102 F. 2d 916, certiorari denied *sub nom. Court Line, Ltd. v. Isthmian Steamship Co.*, 307 U. S. 645	34
Rauton v. Pullman Co., 183 S. C. 495, 191 S. E. 416	27
Rebecca, The, 20 Fed. Cas. 373	17
Rowan v. Commissioner of Internal Revenue, 120 F. 2d 515	24
Royal Mail Steam Packet Co. v. Companhia de Navegaco Lloyd Brasileiro, 31 F. 2d 757, 50 F. 2d 207, aff'd 55 F. 2d 1082, certiorari denied, 287 U. S. 607	24
Sampson v. Channell, 110 F. 2d 754	32
San Pedro, The, 223 U. S. 365	23, 20
Scotland, The, 105 U. S. 24	29, 33, 39, 45
Senator, The, 54 F. 2d 420	24
Sidra, The, reported in Williams and Lauterpacht, *Annual Digest of Public International Law Cases* (1919–1922) 100	27
Slater v. Mexican National Railroad Co., 194 U. S. 120	26, 27
Smith v. Condry, 1 How. 28	25, 26

Cases—Continued Page

Sorrells v. *United States*, 287 U. S. 435 41
Standard Wholesale Phosphate and Acid Works, Inc. v. *Travelers Insurance Co.*, 107 F. 2d 373 45
Stewart v. *Masterson*, 124 U. S. 493 43
Surpine v. *Compania Transatlantica Centroamericana, S. A. et al.*, 37 F. Supp. 263 24
Thomas v. *Western Union Telegraph Co.*, 25 Tex. Civ. App. 398, 61 S. W. 501 27
Titanic, The, 233 U. S. 718 11, 23, 27, 28, 29, 30, 39
Tolchester, The, 42 Fed. 180 23, 34
United States v. *American Trucking Associations Inc.*, 310 U. S. 534 40
United States Gypsum Co. v. *Conners Marine Co.*, 119 F. 2d 689 46
Victor, The, 1 F. Supp. 931 45
Western Union Telegraph Co. v. *Brown*, 234 U. S. 542 27

Statutes:
Limitation of Shipowners' Liability Act, 9 Stat. 635, 46 U. S. C. 182, *et seq.* 3, 9, 14, 18
R. S. 4283 (a), as amended 9, 15, 18, 30, 48
R. S. 4283 (b) 18
R. S. 4284 22, 33, 48
R. S. 4285, as amended 5, 6, 9, 12, 13, 23, 34, 39, 40, 44, 49
R. S. 4286 49
Public Vessels Act of Mar. 3, 1925, 43 Stat. 1112, Secs. 2, 10, 46 U. S. C. 782, 789 42
Suits in Admiralty Act, Act of March 9, 1920, 41 Stat. 525, as amended, 46 U. S. C. 741, *et seq.* 41
28 U. S. C. 878 41
28 U. S. C. 2408 (revised) 41
Maine Laws (1822) c. 14, secs. 8–18 18
Massachusetts Laws (1818) c. 122, secs. 1–3, amended by Mass. Rev. Stat., (1836) c. 32, secs. 1–4 18
English Merchants Shipping Act:
57 and 58 Vict., c. 60, sec. 503 (1894) 20
61 and 62 Vict., c. 14 (1898) 0
63 and 64 Vict., c. 32, sec. 1 (1900) 20

Miscellaneous:
Admiralty Rules (28 U. S. C. foll. § 723):
8 43
51–54 7, 21, 34
6 Benedict, *Admiralty* (6th Ed. Knauth, 1941) 88 20, 21
Committee Report on the History and Present Status of Domestic and Foreign Laws Concerning Shipowners' Liability, Maritime Law Association of the United States, Doc. No. 196 (1935) 2026, 2027 20
Holmes, *The Common Law* (1881) 6–7 19
H. Rep. No. 2517, 74th Cong., 2d sess., p. 6 44

Miscellaneous—Continued

	Page
International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Seagoing Vessels (League of Nations Treaty Series 2763, Vol. 120, p. 125, U. S. Treaty Information Bulletin No. 20, May, 1931, p. 13, 27 Amer. Journal of International Law (Supp.) p. 7)	3, 5, 21
Article 1	6, 51
Article 4	6, 51
Report to the President of the Delegates of the United States to the International Conference on Maritime Law (1922) 54	20
Rules of District Courts:	
S. D. N. Y. Rules 34, 35	34
W. D. Wash., Rules 36–37	34

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 130

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT STEWART & SONS, LTD., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion, findings of fact, and conclusions of law of the District Court of the United States for the Eastern District of New York (R. 14–19) have not been officially reported. The opinion of the Court of Appeals for the Second Circuit (R. 25–27) is reported at 167 F. 2d 308.

JURISDICTION

The judgment of the Court of Appeals was entered on March 29, 1948 (R. 28). The petition for certiorari was filed on June 28, 1948, and

was granted on October 11, 1948 (R. 29).[1] The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

A collision occurred in Belgian territorial waters between a British vessel and one owned by the United States and bareboat-chartered to petitioner Black Diamond. In view of the numerous claims which have been and may be filed against them, the United States and Black Diamond filed a petition in a federal district court for limitation of liability, seeking a *forum concursus* for proration of the inadequate liability fund among the various present and potential claimants.

The court below assumed that the limit of petitioners' liability is governed substantively by Belgian law, which is lower than that provided by American law. The principal question presented is whether the circumstance that a lower foreign limitation is applicable substantively has the effect (a) of depriving the district court of jurisdiction to entertain the petition for limitation, and (b) of compelling petitioners to post security beyond the limit of liability imposed by Belgian law. A subsidiary question is whether,

[1] This Court also granted certiorari in *Black Diamond Steamship Corp.* v. *Robert Stewart & Sons, Ltd., et al.* (No. 121), the companion case which arises upon the same record and involves the same respondents.

in any event, the United States is required to post bond, in any amount, as a condition to filing the petition.

STATUTES AND CONVENTION INVOLVED

The pertinent provisions of the American Limitation of Shipowners' Liability Statute of 1851 (R. S. 4283 (a), 4284, 4285 and 4286, 46 U. S. C. 183 (a), 184, 185 and 186) are set forth in Appendix A, *infra*, pp. 48–50. The pertinent provisions of the International Convention for the Unification of Certain Rules Relating to the Limitation of Liability of Owners of Seagoing Vessels (the applicable Belgian law of limitation of liability) are set forth in Appendix B, *infra*, p. 51.

STATEMENT

On April 28, 1947, the *Norwalk Victory*, a steamship owned by the United States, collided [2] with the British cargo vessel *Merganser* in the Schelde River in the territorial waters of Belgium (R. 16). The *Norwalk Victory* was at that time manned, navigated and operated under a bareboat charter by the Black Diamond Steamship Cor-

[2] The immediate cause of the collision, apart from any question of negligent navigation of either or both ships, seems to have been the derangement of the *Norwalk Victory's* steering gear due to the fact that a four inch piece of marline, left in the vessel's steering system at the time of construction, became lodged in a check valve and thus prevented that vessel from turning to the right in time to avert the collision (R. 4).

poration (Black Diamond) (R. 2). The *Merganser* was loaded with cargo, and as a result of the collision she sank and her chief steward was killed (R. 16).

The *Merganser's* owners instituted suit against Black Diamond in the High Court of Justice of England, Probate, Divorce and Admiralty Division, claiming $1,000,000 for the loss of their vessel (R. 17), and in that suit Black Diamond was required to post security in pounds equivalent to the amount claimed (R. 17). Twenty of the owners of the cargo carried by the *Merganser* filed a suit on October 14, 1947, in the District Court for the Eastern District of New York, against the United States and Black Diamond, asserting cargo loss claims aggregating $1,000,000 (R. 17). Still other *Merganser* cargo-owners (R. 6), and the deceased seaman's representatives, have not yet brought suit against the United States (R. 6). There also is a possibility that the Belgian Government will sue the United States and Black Diamond for damages caused by the collision to the bank of the Schelde River as well as for the cost of removing the wreck of the *Merganser* from the river (R. 6).

Two weeks after the institution of suit by the twenty cargo owners in the District Court for the Eastern District of New York, the United States, as owner, and Black Diamond, as bareboat charterer of the *Norwalk Victory*, filed on October

28, 1947, in the same court, a petition for exoneration from, or limitation of, liability (R. 1–10). The petition, filed within the six months statutory period prescribed by R. S. 4285; set forth the facts concerning the collision and the various asserted and potential claims arising therefrom. Since the collision occurred within the jurisdiction and territorial waters of Belgium, the petition asserted that liability, if any, should be adjudged to be no greater than the maximum permissible under the Belgian limitation of liability law and that such maximum sum should be prorated among the various claimants (R. 6–7, 10). The petition further prayed for a monition directing all claimants for damages resulting from the collision to file their claims with the district court and to appear and answer the allegations of the petition; and for an injunction restraining the prosecution of any action resulting from the collision other than in the present proceeding (R. 9).

Exceptions to the petition were filed by the claimants who had brought the action in the district court. The court, after hearing, found that the law of Belgium as to limitation of liability is the International Convention for the Unification of Certain Rules Relating to the Limitation of Liability of Owners of Seagoing Vessels (Appendix B, *infra*, p. 51); that petitioner's liability, if measured by that law, could not exceed $325,-

028.79;[3] and that Black Diamond had posted in court a surety bond for $325,028.79 (R. 17–18). The district court held, however, that it was immaterial that the collision took place in Belgian territorial waters, and that the "remedy" with respect to limitation of liability was governed by American, and not Belgian, law. Since the security posted by petitioner Black Diamond was less than the value of the owner's interest in the vessel, the court sustained the exceptions and dismissed the petition on the ground that its allegations and the bond posted did not comply with the "jurisdictional" requirements of R. S. 4285 and the appli-

[3] Under the Belgian law, a shipowner's maximum liability for cargo damage is the value of the vessel and of its freight and accessories, or 8 pounds per ton of the vessel's gross tonage, whichever is lower (Article 1, International Convention, Appendix B, *infra*, p. 51). The value of the freight is fixed by Article 4 of the International Convention (Appendix B, *infra*, p. 51) at ten per cent of the value of the vessel at the commencement of the voyage. The *Norwalk Victory's* valuation of $1,000,000 is, of course, even apart from any compensation for freight, far in excess of the $225,028.79 figure arrived at by multiplying the vessel's gross tonnage (6,983.05 tons) by 8 and then by $4.02 13/16 (rate of exchange prevailing on the date of the accident) (R. 18). The sum of $225,028.79, being the lower figure, therefore represents the shipowner's liability under Belgian law. To that figure, the district court (R. 18), as well as the petition itself (R. 8), added ten per cent of the value of the vessel, making a total of $325,028.79.

cable Admiralty Rules[4] (R. 14–19). The district court did not refer to the fact that the United States in the petition for limitation had asked that "no bond be required of it" (R. 8).

On appeal, the Court of Appeals for the Second Circuit in an opinion by Judge Learned Hand held, contrary to the district court, that the Belgian limitation of liability law should be regarded, for purposes of this case, as fixing the maximum liability of the petitioner (R. 26). Nevertheless, it affirmed the dismissal of the petition. The court below reasoned that if, on the one hand, "the limit of all [petitioners'] liabilities is $325,000 and their ship is worth $1,000,000, they have no right to commence such a proceeding as this at all, and are confined to asserting their privilege as a defense to any suits which may be brought against them. If on the other hand they are wrong and the liabilities may go beyond $325,000, on their own argument the bond they propose is too small." (R. 27.) Accordingly, the Court of Appeals held that, in any event, petitioners are not entitled to resort to a *forum concursus* (R. 27). The court below, also, did not advert to the request of the United States that it not be required to post security as a condition to maintaining this proceeding.

[4] Admiralty Rules 51–54 prescribe the procedure governing petitions for limitation of liability.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that petitioner United States had no right to commence a proceeding for limitation of liability.

2. In holding that the record did not present the question whether the Belgian limitation of liability should be referred to in determining whether petitioners were entitled to secure a *forum concursus* and in ascertaining the amount of security to be posted.

3. In failing to hold that the United States was not required to post a bond, apart from the obligation of Black Diamond to do so.

4. In failing to hold that in a limitation proceeding the petitioners are required under R. S. 4285 to post security no greater than the shipowner's maximum liability under the controlling substantive law, which in this case is that of Belgium.

5. In failing to hold that the $325,028.79 bond posted by Black Diamond was sufficient to enable the district court to maintain jurisdiction of the petition for limitation of liability.

6. In failing to hold that the district court improperly dismissed the petition for lack of jurisdiction.

7. In affirming the district court's decree of dismissal.

SUMMARY OF ARGUMENT

I

In 1851, Congress enacted a Limitation of Liability Law for the purpose of putting "American shipping upon an equality with that of other maritime nations" (*The Main* v. *Williams*, 152 U. S. 122, 128). In its substantive aspect, the law limits a shipowner's liability for damages by collision to "the amount or value of the interest of such owner in such vessel". In its jurisdictional and procedural aspects, the law vests the district courts of the United States with jurisdiction over proceedings for limitation of liability, prescribes security and other requirements, and provides that on compliance with these procedural requirements, "claims and proceedings against the owner with respect to the matter in question shall cease". (R. S. 4283 (a) and 4285, 46 U. S. C. 183 (a), 185.) When this legislation was enacted, almost a century ago, the law of every important maritime nation, other than the United States, limited a shipowner's liability to the value of the vessel, and the purpose of the 1851 Act was to remove this inequality against American shipowners. Since that time, however, practically all of the maritime nations, except for the United States, have established a lower limitation.

In the case at bar, the collision occurred in Belgian territorial waters and the limitation im-

posed by Belgian law was assumed applicable by the court below as a matter of substantive law. The principal question presented here is whether this circumstance defeats the jurisdiction of the federal district court to entertain the petition for limitation of liability filed by the United States, as owner of the vessel, and by petitioner Black Diamond, as bareboat charterer, where the security posted by the latter was only in an amount equal to the lower Belgian limitation.

Early experience with the Limitation of Liability Act constrained this Court to admonish the lower courts entrusted with its administration that it was not to be applied "with a tight and grudging hand" but with a view to giving shipowners the full benefit of its immunities (*Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578); and this Court has recently indicated a continuing need for broad and liberal interpretation of the statute's provisions (*Coryell* v. *Phipps*, 317 U. S. 406, 411; *Just* v. *Chambers*, 312 U. S. 383, 385). The refusal of the court below to allow an American shipowner recourse to the Act merely because the substantive limit of his liability, as governed by Belgian law, fixes a lower ceiling than that provided in R. S. 4283 (a), departs from this settled policy of liberal application of the statute's benefits.

II

The question whether the limitation proceeding may properly be maintained depends on a prior determination of the conflict-of-laws problem underlying the case. The court below regarded the Belgian law of limitation as applicable, in view of the undenied allegations of the petition. This is in accord with the position taken by the Government. We believe that the same conclusion can be reached by applying settled conflict-of-law principles. The existence of a tort depends on the law of the place of the wrong. That law also determines the defenses available as well as the measure of damages allowable in a suit arising out of the wrong. Similarly, resort to the *lex loci delicti* is required in ascertaining the extent of a shipowner's limited liability.

The Titanic, 233 U. S. 718, relied on by the district court to justify its contrary conclusion, has no application here. The foreign claimants in *The Titanic* had, by failing to sue the English shipowner under English law in English courts, voluntarily relinquished their right to participate in the larger limitation fund provided by English law. In the present case, however, the claimants seek to increase the amounts recoverable against the American owners by invoking the aid of American courts. *The Titanic* does not hold that, in such circumstances, the higher American limitation should have the effect of depriving a federal court of jurisdiction. Moreover, *The Titanic* in-

volved an accident on the high seas, not in territorial waters within the jurisdiction of a foreign government.

III

In affirming dismissal of the limitation proceeding, the court below deprived petitioners of their right to a *forum concursus,* which ordinarily enables a shipowner, confronted by claims exceeding the amount of his limited liability, to bring all such claims into concourse and have them adjudicated in a single limitation proceeding. This denial of access to a *forum concursus* also prejudices the right of present and potential claimants to secure a fair distribution of the limited liability fund.

A. It is not disputed that a petition for limitation of liability should be dismissed where the limited liability fund exceeds the asserted and potential claims against the petitioning shipowner. Such is not the case here, where the total claims are greater than the liability fund, whether it be computed under the Belgian or American limitation of liability law.

B. A literal reading of R. S. 4285 may justify requirement of a bond equal to the value of the shipowner's interest in the vessel and its freight, irrespective of the amount of his limited liability: However, the statute, properly construed in relation to its purpose, requires posting of security

equal to and not exceeding the maximum amount of liability under the controlling substantive law.

C. Whatever the bond requirements of R. S. 4285 may be, they have no application to the United States. The fact that no bond, in any amount, need be posted by the United States in a limitation proceeding should, in itself, have impelled the court below to reverse the dismissal of the petition, at least so far as the United States was concerned.

D. The court below apparently overlooked the Act of June 5, 1936, which amended R. S. 4285 so as to require the shipowner to assert his privilege of limited liability within six months after claim has been made against him. The effect of that amendment is to bar the filing of any new petition after the six months period. In these circumstances, even if the petition was defective with respect to the security posted, the court below should nevertheless have permitted the petition to stand, thus permitting petitioners to amend it so as to remove any procedural defects. Such disposition, which would have been consistent with that followed by the court below in earlier cases, could not possibly have prejudiced any claimants and would not have deprived petitioners of the right to limit their liability and secure a *forum concursus*.

ARGUMENT

PETITIONERS ARE ENTITLED TO MAINTAIN THIS LIMITATION PROCEEDING AND SECURE A FORUM CONCURSUS

I

INTRODUCTION

A. *Preliminary Analysis.*—The court below assumed, in view of the undenied allegations of the petition as to the applicable law, that the limit of petitioners' liability, as a matter of substantive law, is to be determined by reference to the law of Belgium (R. 26). This was in accord with the Government's position, although (as we shall elaborate in Point II, *infra*, pp. 23–32) we believe the court below should have reached this conclusion by a somewhat different route.

The principal issues raised by the petitions for certiorari are jurisdictional and procedural in nature; in particular, whether the limitation procedure provided by Congress in the Limitation of Shipowners' Liability Act of 1851[5] is available to American shipowners in situations like this, where the substantive limit of liability is governed by a foreign law which fixes a lower ceiling than that provided in the Act. The court below held that the limitation proceeding is not available here because the petitioners are "in a dilemma from which they cannot escape" (R. 27).

---

[5] 9 Stat. 635, 46 U. S. C. 182, *et seq.*, incorporated into the Revised Statutes at Sections 4282 to 4290.

The court below described the dilemma as follows: If, as a matter of substantive law, petitioners' liability will never exceed $325,000, and their ship is worth $1,000,000, they are not now entitled to a *forum concursus*. (The court below stated this categorically, as if it were a self-evident proposition, without giving any reasons for it.) If, on the other hand, the Belgian substantive limitation does not apply, and petitioners may be subject to liabilities exceeding $325,000, the petition must fail because the security posted in that amount by Black Diamond is inadequate. "Thus as things stand," the court below stated, "the petitioners are not entitled to resort to a *forum concursus*." (R. 27.)

With due deference to the learning and authority of Judge Learned Hand in this field, it is respectfully submitted that the "dilemma", on the horns of which the court below has impaled petitioners, is entirely of its own making. The Government contends (1) that the Limitation of Liability Act, properly construed, gives an American shipowner the right to obtain a *forum concursus* wherever the fund available for payment of liabilities is inadequate and should be distributed *pro rata* among the present and potential claimants; (2) that the limit of the shipowner's liability is "the amount or value of the interest of such owner in such vessel," as provided in R. S. 4283 (a), unless the circumstances are such that a

lower foreign limitation is applicable substantively as a matter of conflict-of-laws principles; (3) that where a lower foreign limitation is applicable substantively, it has neither the effect of depriving the district court of jurisdiction nor of compelling the petitioner to post security beyond the limit of his maximum liability; (4) that even if the lower foreign limitation is not applicable in this case, petitioners are nevertheless entitled to maintain this limitation proceeding because—regardless of whether the limit of their liability is $1,000,000 or $325,000—the fund available is inadequate to meet the present and potential claims, and a *forum concursus* is necessary in order to achieve an equitable and ratable distribution among the various claimants; (5) that the United States is not required to post security as a condition precedent to filing a petition for limitation of liability, and dismissal of the petition as to the United States was therefore in any event improper; (6) that the security posted by petitioner Black Diamond was adequate in the circumstances of this case; and (7) even if we are wrong in our previous contentions, and the petition for limitation was defective because of inadequacy of the security posted, this defect was not jurisdictional and the courts below should not have dismissed the petition. In view of the six-months' statute of limitations, apparently overlooked by the courts below, dismissal has the effect of bar-

ring the filing of a new, amended petition. The courts below should, in any event, have permitted the petition to stand, thus enabling petitioners to amend it so as to remove any procedural defects.

B. *General Background.*—Since the case involves concepts in the field of admiralty law which are technical and unfamilar, it may be appropriate to preface our argument with a brief description of the history and purposes of the laws dealing with limitation of shipowners' liability, and the function of the limitation proceeding and its chief attribute, the *forum concursus.*

The principle of limiting the shipowner's liability to the value of his interest in the vessel and its freight appears to deprive from the concept of contract of "commande" in the law merchant, under which a merchant might entrust his goods to another to be used in trade and limit his liability to the amount thus entrusted. *The Rebecca,* 20 Fed. Cas. 373, 378 (D. C. Me.). By the end of the seventeenth century, this principle had become firmly established in the admiralty law of the leading maritime nations of Europe, except England. *The Main* v. *Williams,* 152 U. S. 122, 126.

At common law, both in England and America, "the personal liability of the owner of a vessel for damages by collision is the same as in other cases of negligence, and is limited only by the amount of the loss and by his ability to respond."

The Main v. *Williams, supra,* at 126. Early in the nineteenth century, Massachusetts and Maine allowed local shipowners to invoke privileges of limited liability. Mass. Laws (1818) c. 122, secs. 1–3, amended by Mass. Rev. Stat. (1836) c. 32, secs. 1–4; Me. Laws (1822) c. 14, secs. 8–10. However, it was not until after the decision of this Court in 1848 in *New Jersey Steam Navigation Co.* v. *Merchants Bank,* 6 How. 344, which held a shipowner fully liable for heavy damages caused by his crew's negligence, that the need for nation-wide extension of limited liability benefits was generally recognized. The "uneasiness produced among ship owners by this decision", and the need for "putting American shipping upon an equality with that of other maritime nations", prompted Congress in 1851 to enact the Limitation of Shipowners' Liability Act.[6] See *The Main* v. *Williams,* 152 U. S. 122, 128; *Liverpool &c. Nav. Co.* v. *Brooklyn Terminal,* 251 U. S. 48, 53.

The heart of the Act, R. S. 4283 (a), limits the shipowner's liability for property loss or damage to the amount of his interest in the vessel and its freight,[7] and so adopts the classic device by which the law has encouraged the risking of capital—the limitation of the investor's liability

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[6] 9 Stat. 635, 46 U. S. C. 182 *et seq.*, incorporated into the Revised Statutes at Sections 4282 to 4290.

[7] Personal injury and death claims are placed, so far as limitation of shipowners' liability is concerned, on a statutory basis differing from that fixing his maximum liability for hull or cargo damage and loss. R. S. 4283 (b), 46 U. S. C. 183 (b).

to the amount of his stake in the venture.[8] Since the passage of the Act, this Court has carefully protected the right of the shipowner to limit his liability by construing R. S. 4283. (a) liberally in order to effectuate its purpose of fostering the investment of capital in shipping. *Larsen* v. *Northland Transportation Co.*, 292 U. S. 20, 24; *American Car & Foundry Co.* v. *Brassert*, 289 U. S. 261, 263; *Norwich Company* v. *Wright*, 13 Wall. 104, 121; *Butler* v. *Boston & Savannah Steamship Co.*, 130 U. S. 527, 549; *Just* v. *Chambers*, 312 U. S. 383, 385; *Coryell* v. *Phipps*, 317 U. S. 406, 411; *Providence & New York Steamship Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 589. The purposes of the legislation which have guided the courts in construing it have been expressed in various ways: "to promote the building of ships, and to encourage persons engaged in the business of navigation" (*Moore* v. *American Transportation Co.*, 24 How. 1, 39); "to encourage investments in ships and their employment in commerce" (*American Car & Foundry Co.* v. *Brassert, supra*, at 263); to put "American shipping upon an equality with that of other maritime nations" (*The Main* v. *Williams, supra*, at 128); and "to give our shipowners a chance to compete with those of Europe" (*Liverpool &c. Nav. Co.* v. *Brooklyn Terminal*, 251 U. S. 48, 53).

[8] A shipowner's limited liability has often been compared to that of the corporate stockholder. *Norwich Co.* v. *Wright*, 13 Wall. 104, 121; Holmes, *The Common Law* (1881) 6–7.

While this Court was insisting on liberal construction of the Act in order to aid in the achievement of its objectives, foreign countries were making substantive changes in their limitation of liability laws to such an extent that today nearly all foreign limitation laws[9] are more generous to the shipowner, allowing him to take advantage of a liability limit considerably lower than that available under R. S. 4283 (a).

The English statute,[10] which is also controlling in Australia, Canada, India and South Africa, limits the shipowner's liability, for cargo loss or damage, to 8 pounds per ton.[11] This limit is more favorable to the shipowner than that provided under R. S. 4283 (a) since the value of the

[9] See Committee Report on the History and Present Status of Domestic and Foreign Laws Concerning Shipowners' Liability, Maritime Law Association of the United States, Doc. No. 196 (1935), 2026, 2027, listing thirty-one foreign countries, including Great Britain, Germany, France, Japan, Norway, Italy and Belgium, which have limitation of liability systems in effect. Benedict lists still other foreign nations which have also limited shipowners' liability. 6 Benedict, *Admiralty* (6th ed., Knauth, 1941) 88.

[10] The Merchant Shipping Acts, 57 & 58 Vict., c. 60, sec. 503 (1894); 61 & 62 Vict., c. 14 (1898), 63 & 64 Vict., c. 32, sec. 1 (1900).

[11] The figure of 8 pounds per ton was fixed on the supposition that the total British tonnage divided into its aggregate value would equal that amount. The justification of this 8 pound per ton figure is "that *on the average* that will fairly represent the value of the shipowner's interest in the joint venture." Report to the President of the Delegates of the United States to the International Conference on Maritime Law (1922), 54.

offending vessel is generally large in proportion to its tonnage.[12]

Even more favorable to the shipowner are the limitations of liability applicable in Belgium, as fixed in 1924 by the International Maritime Committee in the Brussels Convention upon the Limitation of Shipowners' Liability. This Convention, which has been adopted not only by Belgium, but by Brazil, Denmark, Finland, France, Hungary, Monaco, Norway, Poland, Portugal, Spain, and Sweden,[13] limits the shipowner's liability for cargo loss or damage to either 8 pounds per ton or the value of the vessel and its freight and accessories, whichever is lower (Appendix B, *infra*, p. 51).

To effectuate the immediate purpose of R. S. 4283 (a), *i. e.* the limitation of the shipowner's liability to the value of his interest in the vessel and its freight, this Court, in 1872, promulgated Admiralty Rules 54–57 (now 51–54) prescribing the practice in limitation proceedings. A shipowner, seeking the benefit of a limitation statute, may file a petition in a United States District

[12] It is only in those situations where the offending vessel becomes a total loss in the accident that it would be to the shipowner's advantage to invoke R. S. 4283 (a), since his interest in the value of the vessel (*i. e.*, the measure of his liability) is ascertained after the disaster. *The City of Norwich*, 118 U. S. 468, 493; *The Benefactor*, 103 U. S. 239, 246–247; *Norwich Co.* v. *Wright*, 13 Wall. 104, 126–127.

[13] 6 Benedict, *Admiralty* (6th ed. Knauth, 1941) 88.

Court in admiralty against one claiming damages for loss. The petition ordinarily asks that the shipowner's liability, if the vessel be found at fault, be limited to the value of the vessel and its freight, and that all others having similar claims against the vessel and the owner be brought into concourse in the proceeding, by monition, and enjoined from suing the vessel and owner on such claims in any other court. *Hartford Accident Co.* v. *Sou. Pacific,* 273 U. S. 207, 214–215.

This bringing of all claims into concourse, generally referred to as a *forum concursus,* establishes a shipowner's limited liability fund and enables it to be distributed, as required by statute, among the claimants "in proportion to their respective losses". R. S. 4284; see *Butler* v. *Boston & Savannah Steamship Co.,* 130 U. S. 527, 550–551, 552; *Monongahela River Consol. Coal & Coke Co.* v. *Hurst,* 200 Fed. 711, 713 (C. C. A. 6). As this Court has said, the limitation proceeding, including its *forum concursus,* "partakes in a way of the features of a bill to enjoin a multiplicity of suits, a bill in the nature of an interpleader, and a creditor's bill." *Hartford Accident Co.* v. *Sou. Pacific,* 273 U. S. 207, 216.

The limitation proceeding thus serves a dual function: (1) it protects the shipowner by establishing a limit upon his total liability; and (2) it protects the present and potential claimants by providing for fair and ratable distribution of the

limited liability fund among the various claimants. See *The Aquitania*, 20 F. 2d 457 (C. C. A. 2). Such proration, which assures all claimants of a partial, proportionate recovery, can be accomplished only by bringing all asserted and potential claimants into a single proceeding. *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 594. The statute, recognizing that multiple suits may destroy the benefits of limitation, itself enjoins "all claims and proceedings against the owner" where the latter has filed a proper petition for limitation of liability. R. S. 4285; see *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 599, 600; *The San Pedro*, 223 U. S. 365, 372; *Dowdell* v. *United States District Court*, 139 Fed. 444, 445 (C. C. A. 9); *The Pelham*, 69 F. Supp 586, 587 (S. D. N. Y.); *The Tolchester*, 42 Fed. 180, 184–185 (D. Md.). The resulting concourse of all claims assures claimants, present and potential, that they will receive their fair and equitable share of the limited liability fund.

II

THE CHOICE-OF-LAW PROBLEM

As has been stated, the case involves a preliminary choice-of-law question whether the limit of petitioners' liability is governed by the law of Belgium, the situs of the collision, or of the United States, the forum. The district court, citing *The Titanic*, 233 U. S. 718, and *Royal Mail*

Steam Packet Co. v. *Companhia de Navegaco Lloyd Brasileiro*, 31 F. 2d 757 (E. D. N. Y.), held that in a limitation proceeding such as this the issue of limitation liability is determined exclusively by reference to the law of the forum (R. 15). This holding was apparently rejected by the court below (R. 26). In his opinion for that court, Judge Learned Hand noted that the case arose upon exceptions to the limitation petition, and that its allegations as to foreign law, which are treated as allegations of fact,[14] are to be regarded as conclusive. Construing the petition "with as favorable an eye as is possible" (R. 26), the court below read the petition as containing an allegation that the limitation of liability imposed by Belgian law "attached to the right" and hence was applicable as a matter of substantive law in the present proceeding.

While the Government agrees with this conclusion as to the applicability of Belgian law, we believe it can rest on a broader basis. Even if

[14] Since exceptions serve the same function as a demurrer, the petition's allegations of fact stand admitted. *Suspine* v. *Compania Transatlantica Centroamericana, S. A., et al.*, 37 F. Supp. 263, 264–265 (S. D. N. Y.); *The Senator*, 54 F. 2d 420 (D. Del.); *The Blue Mountain, Etc., Line* v. *Youghiogheny & Ohio Coal Co.*, 20 F. Supp. 165 (D. Conn.). This admission extends to allegations as to foreign law, which are treated as allegations of fact (R. 37). See *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 444; *Rowan* v. *Commissioner of Internal Revenue*, 120 F. 2d 515 (C. C. A. 5); *Empresa Agricola Chicama Ltda.* v. *Amtorg Trdg. Corp.*, 57 F. Supp. 649, 650 (S. D. N. Y.).

this case had not arisen upon the pleadings, the court below would have been justified in holding, on the basis of well settled conflict-of-laws principles, that in a proceeding growing out of a collision between vessels in the territorial waters of another country, the limit of liability provided by the law of that country should be applied, at least where, as here, that limit does not exceed the limit provided by the law of the United States. It is axiomatic that liability for a tort depends upon the law of the place where it occurred, and that that law also determines the defenses available as well as the measure of damages allowable in a suit based thereon. In *Cuba Railroad Company* v. *Crosby,* 222 U. S. 473, 479, Mr. Justice Holmes wrote for the Court:

> We repeat that the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well founded belief that it was a cause of action in that place. The right to recover stands upon that as its necessary foundation.

Accord: *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347, 356.

Early in its history, this Court applied these principles in a case arising out of a collision between two American vessels in the port of Liverpool (*Smith* v. *Condry,* 1 How. 28, 33):

> The collision having taken place in the port of Liverpool, the rights of the parties

> depend upon the provisions of the British Statutes, then in force; and if doubt exists as to their true construction, we must of course adopt that which is sanctioned by their own courts.[15]

English collision cases are in accord: See *The Arum,* [1921] Prob. 12, 20; *The M. Moxham,* [1876] 1 Prob. 107, 111; *The Hagen,* [1908] Prob. 189.

On the specific question as to the law governing the measure of damages and limit of liability, it is equally well settled that where the place of the wrong allows a lesser recovery than the forum, it is obviously unfair to award damages on the higher basis and thus give plaintiffs an incentive for shopping around for the most favorable forum. *Slater* v. *Mexican National Railroad Company,* 194 U. S. 120, held that a court should not render judgment for damages in excess of that allowed by the law of the place of the wrong. A contrary holding, it was pointed out, would "deny

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[15] In *Smith* v. *Condry, supra,* the defendant argued that he was not liable because his vessel, at the time of the collision, was under the control of an official pilot. Under British law at the time, official pilotage was a good defense in a collision suit, because the pilot was not deemed an agent of the shipowner and the doctrine of *respondent superior* was therefore inapplicable. Since this defense was available under English law, and the accident occurred in British territorial waters, this Court allowed the defendant shipowner, in a suit brought in this country, to exonerate himself from liability by invoking the same defense. In *The Arum, supra,* where the collision occurred in Gibraltar harbor, the English court applied Gibraltar law which exonerated a shipowner from liability for the negligence of a compulsory pilot, even though under the English statute, then in effect, compulsory pilotage was not a good defense.

the defendant the benefit of whatever limitations on his liability" he would otherwise have available (194 U. S. at 126). Accord: *Western Union Telegraph Co.* v. *Brown,* 234 U. S. 542.[16] This principle is also applied in admiralty. *The Sidra,* decided by a British-American Claims Tribunal, reported in Williams and Lauterpacht, *Annual Digest of Public International Law Cases* (1919–1922) 100; *The Mandu,* 102 F. 2d 459, 463, 114 F. 2d 361 (C. C. A. 2), certiorari denied, 311 U. S. 715; *The Eagle Point,* 142 F. 453 (C. C. A. 3), certiorari denied, 189 U. S. 510, 201 U. S. 644; (Cf. *Canada Malting Co.* v. *Paterson Steamships, Ltd.,* 285 U. S. 413, 424).

The district court in the present case fell into error in believing that *The Titanic,* 233 U. S. 718, is in conflict with the settled principles discussed above. In that case a British vessel collided on the high seas with an iceberg, and sank with considerable loss of life and property. A number of claimants, including English nationals, brought actions against the shipowner in federal and state courts, and the principal question was whether the shipowner could maintain a limitation of liability

[16] State courts follow the same rule and allow damages for an extraterritorial tort only to the extent that the place of the wrong recognizes such damages. *Rauton* v. *Pullman Co.,* 183 S. C. 495, 191 S. E. 416; *Thomas* v. *Western Union Telegraph Co.,* 25 Tex. Civ. App. 398, 61 S. W. 501; *Christensen* v. *Floriston Pulp & Paper Co.,* 29 Nev. 552, 92 Pac. 210; *Louisville & N. R. Co.* v. *Lynch,* 137 Ky. 696, 126 S. W. 362. See also *Giddings* v. *Zellan,* 160 F. 2d 585 (App. D. C.), certiorari denied, 332 U. S. 759; *Hupp Motor Co.* v. *Wadsworth,* 113 F. 2d 827 (C. C. A. 6).

proceeding in this country. The Court, in an opinion by Mr. Justice Holmes, held that the proceeding could be maintained and that the laws of the United States respecting limitation of liability should be applied.

The Titanic is distinguishable on two separate grounds:

(1) The decisive factor in that case, as is indicated by the opinion, was that the foreign claimants, by resorting to American courts, voluntarily relinquished the higher benefits of the English law of limitation of liability. The question before the Court was "only whether those [foreign claimants] who do see fit to sue in this country are limited in their recovery irrespective of the English law" (233 U. S. at 732–733). The opinion indicates that the "essential point" of the case is that "the limitation might be applied to foreign ships if sued in this country although they were not subject to our substantive law" (p. 733). It is in this context that we must read the sentence appearing a few lines later in Mr. Justice Holmes' opinion: "This statute well might be held to announce a general policy, governing both obligations that arise within the jurisdiction and suits that are brought in the courts of the United States" (*ibid.*). In the present case, unlike *The Titanic*, we have no question of voluntary relinquishment by foreign claimants of a right to a larger foreign limitation. Here, the problem is

rather whether claimants should be permitted to increase the amount of their recovery by taking advantage of the higher limitation of the forum and thus impose upon an American shipowner a liability greater than that prescribed by the law of the place of the wrong.

(2) Moreover, *The Titanic* dealt with a collision which occurred on the high seas rather than within territorial waters. In connection with collisions on the high seas "where the law of no particular State has exclusive force, but all are equal", it is only natural for the forum to invoke "its own law as presumptively expressing the rules of justice". See *The Scotland,* 105 U. S. 24, 29; *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347, 355-356; *The Hamilton,* 207 U. S. 398, 403.

The opinion below in the present case apparently agreed with our views as to the inapplicability of *The Titanic.* Judge Hand stated that "we are not to understand the decision in *The Titanic, supra,* as meaning that we would refuse to recognize limits imposed upon an owner's liability by other nations which they attached to the right" (R. 26). *The Titanic* clearly stands only for the proposition that where a foreign vessel has sunk on the high seas, the claimants' maximum recovery in our courts may not exceed that set by the limitation of liability law of the United States, if that law allows a lesser recovery

than the law of the flag of the ship. In situations like the present case, however, where a collision occurs within the territorial waters of a foreign country having a limitation lower than that provided by the United States, and the lower foreign limitation "attaches to the right", it should be enforced in the courts of this country.

This conclusion is required not only by the authorities already cited but by considerations of policy. Enforcement of the foreign limitation is necessary to protect American shipowners from being discriminated against merely because claims have been filed in the United States rather than in the courts of the place of the wrong. Reference by an American court exclusively to our own limitation of liability laws so as to deprive American shipowners of a lower limitation imposed by the *lex loci delicti* would encourage foreign claimants to resort unduly to our courts. While there may be justification, as *The Titanic, supra,* indicates, for the forum's refusal to impose a higher foreign limitation, these same policy considerations cannot justify refusal to apply a lower foreign limitation.

This Court has said in another context that "the law of the forum is material only as setting a limit of policy beyond which" an obligation arising in a foreign country would not be enforced here. *Cuba Railroad Co.* v. *Crosby,* 222 U. S. 473, 478. R. S. 4283 (a) sets a maximum, and not a

minimum, limitation. It involves no inconsistency with the statute to enforce a lower foreign limitation. Indeed, to do so is in strict accord with the fundamental purpose of our limitation of liability laws, namely, to encourage investments in shipbuilding and the employment of ships in commerce. *Butler* v. *Boston and Savannah Steamship Co.*, 130 U. S. 527, 549; *Just* v. *Chambers*, 312 U. S. 383, 385; see cases cited, p. 19, *supra*. And this Court has frequently emphasized the need for construing these laws "broadly and liberally" so as to achieve their fundamental purpose. *Coryell* v. *Phipps*, 317 U. S. 406, 411; *Larsen* v. *Northland Transportation Company*, 292 U. S. 20, 24; *Providence & New York Steamship Co.* v. *Hill Manufacturing Co.*, 109 U. S. 578, 589.

As has been shown (*supra*, pp. 20–21), nearly all foreign limitation laws are more advantageous to the shipowner than R. S. 4283 (a). Since these foreign limitation laws generally allow a lower limit of liability than does the American law, a requirement that the federal courts must apply the American limitation even with respect to collisions occurring in foreign territorial waters would encourage foreign claimants to file their claims against the shipowner in the courts of the United States. There is no reason to suppose that Congress intended that claimants should thus be enabled to derive financial advantage at the

expense of American shipowners. It is submitted, on the contrary, that considerations of policy favor application by the forum of the lower limitation of liability which would have been applied had suit been brought where the tort was committed. In this aspect the question is comparable to those which have arisen out of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, and the rulings made by this Court in dealing with such problems should be persuasive here. See *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 109; *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487; *Cities Service Co.* v. *Dunlap*, 308 U. S. 208; *Palmer* v. *Hoffman*, 318 U. S. 109, 117; and see *Sampson* v. *Channell*, 110 F. 2d 754 (C. C. A. 1).

III

THE PETITION FOR LIMITATION OF LIABILITY SHOULD NOT HAVE BEEN DISMISSED

The principal error committed by the court below, in affirming dismissal of the petition for limitation, was to deprive petitioners of their right to a *forum concursus*, a right which is clearly conferred by the Limitation of Liability Law and which is corollary to the substantive right of limitation. If the judgment of dismissal stands, the right to petition for limitation of liability has been irrevocably lost in view of the six-months' time limit, apparently overlooked by the court below, imposed on that right since 1936.

A. The Necessity for Proration of the Limited Liability Fund among the Present and Potential Claimants Requires a "Forum Concursus"

When the shipowner's liability, as limited by statute, is insufficient to pay each of the several claimants in full, R. S. 4284 averages the loss by expressly prescribing a distribution among the claimants "in proportion to their respective losses." *Butler* v. *Boston & Savannah Steamship Co.*, 130 U. S. 527, 550–551, 552; *Monongahela River Consol. Coal & Coke Co.* v. *Hurst*, 200 Fed. 711, 713 (C. C. A. 6). To effectuate such proration, it is essential that all asserted and potential claims be brought into a single proceeding. *Providence & N. Y. SS Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 594. Concededly, as the court below pointed out (R. 27), a shipowner may assert limited liability in any suit instituted against him. *The Scotland*, 105 U. S. 24, 33–34. But judgments for different claimants in such separate suits, the amount of each of which is no greater than the shipowner's limited liability might, when aggregated, result in a total liability far in excess of the statutory limitation. Moreover, it would be manifestly unjust to later claimants if the limited fund were to be exhausted through satisfaction of those claims which happened to be prosecuted earliest.

The statute, recognizing that multiple suits may destroy the benefits of limitation, itself enjoins "all claims and proceedings against the owner" where the latter has filed a proper petition for

limitation of liability. R. S. 4285; see *Providence & N. Y. SS Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 599–600; *The San Pedro*, 223 U. S. 365, 372; *Dowdell* v. *United States District Court*, 139 Fed. 444, 445 (C. C. A. 9); *The Pelham*, 69 F. Supp. 586, 587 (S. D. N. Y.); *The Tolchester*, 42 Fed. 180, 184–185 (D. Md.); *In re Long Island North Shore Passenger and Freight Transportation Co.*, 5 Fed. 599, 628 (S. D. N. Y.). And Admiralty Rule 51, promulgated by this Court to implement the statute, directs the issuance of monitions compelling all claimants to appear and present their claims to the court in which the limitation petition was filed.[17] The resulting *forum concursus* thus makes possible fulfillment of the chief object of a limitation proceeding, i. e., the proration among the claimants of a fund which is insufficient to pay all claims in full but which represents the amount of the shipowner's maximum limited liability. See *The Quarrington Court*, 102 F. 2d 916, 918 (C. C. A. 2), certiorari denied *sub nom. Court-Line, Ltd.* v. *Isthmian Steamship Co.*, 307 U. S. 645; *Providence & N. Y. SS. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 594.

Of course, where the limited liability fund is large enough to enable full payment to all claim-

[17] Local court rules require publication of the monition, as well as direct service thereof, on all known claimants. See, *e. g.*, Rules 34–35, D. C. S. D. N. Y.; Rules 36–37, D. C. W. D. Wash.

ants, there is no need for proration or *concursus*. *The Aquitania*, 20 F. 2d 457 (C. C. A. 2). On the other hand, where the asserted and potential claims against the shipowner exceed the amount of the fund, a *forum concursus* is essential to effectuate the statutory proration. And the courts consistently heretofore, including the court below, have held that in such circumstances a petition to limit liability and secure a *concursus* is not subject to dismissal. *Curtis Bay Towing Co.* v. *Tug Kevin Moran, Inc.*, 159 F. 2d 273, 276 (C. C. A. 2); *Colonial Sand & Stone Co.* v. *Muscelli*, 151 F. 2d 884 (C. C. A. 2); *Anderson* v. *Alaska Steamship Co.*, 22 F. 2d 532, 534 (C. C. A. 9); *The George W. Fields*, 237 Fed. 403 (S. D. N. Y.).

The dismissal of the petition for limitation in the instant case is in direct conflict with these precedents. Twenty cargo claimants have already filed suit in the Eastern District of New York demanding $1,000,000 from petitioners for loss of their cargo (R. 17).[18] A suit against Black Diamond, claiming an additional $1,000,000 in damages, has been instituted in English courts (R. 17). Still further suits, seeking wrongful death damages as well as to recover for damages to the bank of the

[18] The record shows that still other cargo-owners may file additional suits (R. 6). We are advised that the libel filed in the Eastern District of New York by the cargo claimants has been amended to include some additional claims. The amended libel seeks damages in the amount of $900,000.

Schelde River are possible (R. 6). For the satisfaction of these claims which may aggregate millions of dollars, there is available a limited liability fund, which, even if determined without reference to the Belgian law, does not exceed $1,000,000.[19] It is clear, therefore, that the total amount of asserted and assertable claims far exceeds any limited liability fund—whether Belgian or American law applies—which would be available to the claimants in this case.

We believe that the Belgium limitation governs substantively and does not operate to defeat the district court's jurisdiction. The court below, assuming with petitioners that the Belgian limitation was applicable substantively, held nevertheless that the present proceeding could not be maintained because the amount of maximum lia-

[19] In the usual limitation case, not involving the foreign law problem here presented, maximum recovery is limited, under R. S. 4283 (a), to the value of the vessel and her freight as ascertained at the end of the voyage. *The City of Norwich*, 118 U. S. 468, 490–491; *The Great Western*, 118 U. S. 520; *The Doris Eckhoff*, 30 Fed. 140 (S. D. N. Y.). The record reveals that the *Norwalk Victory* was valued at $1,000,000 (R. 8), but is silent as to the value, if any, of the freight for the cargo she carried on the voyage out of which the claims arose. See *The Main* v. *Williams*, 152 U. S. 122, 131–132; *LaBourgogne*, 210 U. S. 95, 134–135; *In re Meyer*, 74 Fed. 881, 897 (N. D. Cal.). This absence of information as to the value of the freight evidently led the court below to assume that there was no compensation due the petitioners for freight, and that liability could not exceed $1,000,000. A bond in that amount would, the court concluded, therefore be required under R. S. 4285 (R. 26).

bility under Belgian law ($325,000) was less than the value of the vessel ($1,000,000). The court regarded this as fatal to the petition, because petitioners could not, on their own assumption, be liable in an amount exceeding $325,000, and hence the court evidently believed there was no necessity for the present proceeding.

The answer to this argument is clear. As has been shown, a limitation proceeding is intended to protect not only the shipowner but also the claimants, present and potential. The argument of the court below that a shipowner is not entitled to a *forum concursus*, merely because there is no danger that he will be compelled to pay more than the maximum provided by the law, obviously goes too far. If valid, it would equally deprive a shipowner of a *forum concursus* in the ordinary situation, not involving any foreign elements, where the American limitation unquestionably applies. If, for example, the collision in the present case had occurred in territorial waters of the United States, the limit of liability would, of course, be $1,000,000. However, if the petitioners, faced with these claims (which may well run into millions of dollars), had filed a petition for limitation in the Second Circuit, they could be met by the argument made below by Judge Hand, namely, that they were not entitled to maintain the petition because the $1,000,000 limitation could always be asserted as a defense to any suits that might be brought. It seems obvious

that such an argument would be wholly inconsistent with the purpose of the statute to afford a forum in which all the claims, asserted and assertable, could be brought in and satisfied as equitably and fairly as possible.

The defect in Judge Hand's argument is equally apparent, whether the assumed limit of liability is $325,000 or $1,000,000. The decisive fact is that the amount of claims which have been or may be filed is greater than either amount, and hence there is a clear necessity for proration of the inadequate liability fund among the various present and potential claimants. This is an *à fortiori* conclusion in the present case because the lower Belgian limitation clearly applies.

It cannot be contended that petitioners' right to a *forum concursus* should be defeated merely because the substantive limit of liability is derived from the *lex loci delicti*, and is less than the value of the vessel. To be sure, the statutory provisions—enacted by Congress almost a century ago—were apparently drafted on the assumption that the limit of liability would be the value of the vessel. When this legislation was enacted, the law of every important maritime nation limited shipowners' liability to the value of the vessel. At that time, therefore, it was immaterial, as a practical matter, whether the American or a foreign limitation applied substantively: both were identical. This explains why Congress used the phrase "the value of the * * * vessel".

The use of this phrase does not imply, we submit, that Congress intended to deprive the district courts of jurisdiction over limitation proceedings where the applicable substantive law imposed a lower limitation than that of the United States. This Court has held that foreign vessels may resort to the federal courts for limitation of liability under R. S. 4283. See *The Scotland*, 105 U. S. 24; *LaBourgogne*, 210 U. S. 95; *The Titanic*, 233 U. S. 718, 731. It would be anomalous to hold that Congress has precluded American shipowners from obtaining a *forum concursus* in the courts of the United States in cases where the limit of liability, governed by laws of foreign countries enacted since 1851, is less than the value of the vessel; and we do not understand the opinion below to convey any intimation that this is the effect of the statute. Since a shipowner will be entitled, in any event, to assert his limit of liability, as a defense to any suits which may be brought, as Judge Hand pointed out (R. 27), it is only fair to all the claimants, present and potential, that there be a concourse now in which the liability fund may be distributed equitably and ratably, rather than that the matter be dealt with in a series of unrelated and perhaps conflicting lawsuits.

B. The Security Posted by Petitioner Black Diamond Satisfies the Requirements of the Statute

R. S. 4285 requires a shipowner who petitions for limitation of liability to deposit with the court "for the benefit of claimants," approved

security equal to the amount of the owner's interest in the vessel and its freight. The act further authorizes the court to require such additional security as the court determines may be "necessary to carry out the provisions" of the Limitation of Liability Statute. These two statutory provisions clearly express the obvious purpose of the bond requirement, *i. e.*, to assure payment to the claimants of any amounts found due them.

It is true that a literal reading of R. S. 4285 would call for a bond for the full value of the owner's interest in the vessel and its freight. However, it is obvious the statutory language was cast in terms of the value of the interest in vessel and freight which, in the normal limitation situation, represent the shipowner's maximum liability and fix the fund available to claimants. Certainly, where the actual, maximum liability is far less than the value of that interest, requiring a bond for a sum in excess of the actual, maximum liability could not possibly inure to "the benefit of claimants" and would, as petitioners argued below, "merely * * * impose an idle burden on the shipowner and * * * benefit no one but the bonding companies" (R. 27). Such futile and unreasonable result, in no way related to the purpose of the statute, should be avoided. *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534, 543; *Armstrong Co.* v. *Nu-Enamel Corp.*, 305

U. S. 315, 333; *Sorrells* v. *United States*, 287 U. S. 435, 446, *et seq.*

C. In Any Event, Dismissal of the Petition Was Improper as to the United States

The court below assumed that, if the limited liability fund actually was in excess of $325,000, the $325,000 "bond they [*i. e.*, the United States and Black Diamond] propose is too small." This conclusion entirely overlooks the fact that, so far as the United States is concerned, it may petition for limitation of its liability without posting any bond at all. Section 2408 of the newly-revised Title 28 of the United States Code provides:

> Security for damages or costs shall not be required of the United States, any department or agency thereof or any party acting under the direction of any such department or agency on the issuance of process or the institution of prosecution of any proceeding.

This provision, based on the old 28 U. S. C. 870, reflects the obvious absurdity of compelling the United States to post bond furnished by a private company whose financial resources are, by comparison, feeble.

That the United States may maintain a limitation proceeding, without posting a bond, is implicit in the provisions of the Suits in Admiralty Act,[20] under which the United States was joined

[20] Act of March 9, 1920, 41 Stat. 525, as amended. 46 U. S. C 741, *et seq.*

as a defendant by the cargo-owners against whom the limitation petition here involved is directed. (See *supra*, p. 4). That Act, in conferring a right to suit against the United States, where the United States-owned vessel is employed as a merchant vessel, expressly provides that the United States shall not be required to give any bond in admiralty proceedings against it (Sec. 3), and specifically confers upon the United States the benefits "of all limitations of liability accorded by law" (Sec. 6).[21] Where the United States, therefore, petitions for limitation of liability asking for a *concursus* of claims asserted or assertable against it under the Suits in Admiralty Act, as it did in the instant case, it cannot of course be deemed to have waived its immunity from the bond-posting requirement. The only case on this point so holds. *The El Sol,* 45 F. 2d 852, 855–856 (S. D. N. Y.), affirmed *sub nom. Southern Pacific Co.* v. *United States,* 72 F. 2d 212 (C. C. A. 2). Since the bond requirement therefore has no application to the United States, it is obvious that

[21] The only other statute conferring the right to sue the United States in admiralty for damages caused by United States-owned public vessels provides that suits thereunder shall "proceed in accordance with the provisions of" the Suits in Admiralty Act. Public Vessels Act of March 3, 1925, 43 Stat. 1112, Sec. 2, 46 U. S. C. 782. The Public Vessels Act, like the Suits in Admiralty Act, also makes available to the United States "all limitations of liability." Sec. 10, 46 U. S. C. 789.

dismissal of the petition on the ground that the $325,000 bond "is too small" (R. 27) was, at least so far as the United States is concerned, clearly incorrect.

Moreover, even if the petition for limitation had been defective because the security posted was inadequate or otherwise defective, it would have been improper for the court below to affirm dismissal of the petition. Such defects are not jurisdictional; and the proper procedure would have been to remand the cause to the district court in order to afford opportunity for amending the petition and bond so as to remove whatever deficiencies existed. See *Bigler* v. *Waller*, 12 Wall. 142, 149; *Davis* v. *Wakelee*, 156 U. S. 680; *New Orleans Ins. Co.* v. *Albro Co.*, 112 U. S. 506; *Stewart* v. *Masterson*, 124 U. S. 493. This procedure is permissible under Rule 8 of the Rules of Practice in Admiralty (28 U. S. C. foll. § 723).

D. The Petition for Limitation was not Prematurely Filed

The opinion of the court below seems to intimate that, in the event additional suits should be filed, petitioners would be able to invoke their right of limited liability and that the sufficiency of the neeessary bond could be determined at that time (R. 27).

The suggested justification for the dismissal of the petition for limitation of liability contrasts

sharply with this Court's policy of safeguarding such petitions against improvident dismissal. Even where no present need for limitation is apparent, this Court has rejected attempts to dismiss the petition. *Langnes* v. *Green*, 282 U. S. 531, emphasizes the dangers of, and consequent need for preventing, indiscriminate dismissals of limitation petitions. In that case, the district court was directed not to dismiss such a petition "as a matter of precaution * * * in the possible but * * * unlikely event" that petitioner might need to invoke the benefits of R. S. 4283 in the district court at some later date. The desirability of ordering such precautions in the *Langnes* case is evidenced by *Ex parte Green*, 286 U. S. 437, which was decided by this Court after "the possible but unlikely event," *i. e.*, the challenging of petitioner's right to limit liability in the state court, had materialized.

The matter need not, however, be resolved by reference merely to considerations of judicial policy. Congress, in the Act of June 5, 1936 (49 Stat. 1479, 1480), amended R. S. 4285 so as to require the shipowner to assert his privilege to limit liability within six months after claim has been made against him. Prior to that amendment, there was no time fixed within which such a petition might be filed. House Report No. 2517, 74th Cong., 2d sess., p. 6. Consequently, the im-

provident dismissal of a petition did not then prejudice the shipowner who, at any later time, even after judgment was had against him (*Larsen* v. *Northland Transportation Co.*, 292 U. S. 20) or even after appeal from the judgment and the giving of a supersedeas (*The Victor*, 1 F. Supp. 931 (E. D. N. Y.)), could file additional petitions. However, since the 1936 amendment, it is clear that a shipowner cannot avail himself of his privilege of filing a petition after the six-months' period. *Petition of Goulandris*, 140 F. 2d 780 (C. C. A. 2), certiorari denied *sub nom. Goulandris et al.* v. *American Tobacco Co.*, 322 U. S. 755; *The Fred Smartley, Jr.*, 108 F. 2d 603, 607 (C. C. A. 4), certiorari denied *sub nom. S. C. Loveland, Inc.* v. *Pennsylvania Sugar Co.*, 309 U. S. 683; *Standard Wholesale Phosphate and Acid Works, Inc.* v. *Travelers Insurance Co.*, 107 F. 2d 373 (C. C. A. 4).[22]

[22] In addition to his right to initiate proceedings by petitioning for exoneration or limitation of liability and so secure a *forum concursus* and restrain other suits, the shipowner may plead limitation as a defense in his answer to a claimant's libel against him. *The Scotland*, 105 U. S. 24, 33–34. While the six-months' limit imposed by the 1936 amendment is clearly applicable to petitions for limitation, it may not be applicable to pleading of limitation of liability in the answer. *The Chickie*, 141 F. 2d 80, 84 (C. C. A. 3); *Coryell* v. *Pilkington*, 39 F. Supp. 142, 145 (S. D. Fla.), affirmed, 128 F. 2d 702 (C. C. A. 5), affirmed, 317 U. S. 406; *De Pinto* v. *O'Donnell Transp. Co.*, 293 N. Y. 32; *Cantey* v. *McLain Line, Inc.*, 40 F.

Recognizing this, the court below itself has heretofore held that a timely-filed petition should not be dismissed but should be allowed to stand, since "by some chance, which at the moment is too remote for practical recognition, other claims should appear" which would require a pro rata distribution of an inadequate fund and thus make a *concursus* necessary. *Curtis Bay Towing Co.* v. *Tug Kevin Moran, Inc.*, 159 F. 2d 273, 276 (C. C. A. 2). The extreme remoteness of the need for a *forum concursus* in the *Curtis Bay Towing* case is evidenced by the fact that, at the time the motion to dismiss the petition was rejected, claims aggregating only $17,000 had been asserted against a maximum liability fund of $209,000. When those figures are compared to the claims and liability fund in the instant case,[23] there can be no doubt that the petition here should have been allowed to stand. Such action could not have prejudiced the cargo-claimants and would not have deprived petitioners of the benefits of a limitation proceeding even after the six-months period had elapsed.

Supp. 887 (S. D. N. Y.); *Carpenter* v. *Mary R. Mullins, Inc.*, 33 F. Supp. 10, 12 (D. Mass.); *The Bright*, 38 F. Supp. 574, 576 (D. Md.); *De Cruz* v. *Hiering*, 69 F. Supp. 397 (D. N. J.); cf. *United States Gypsum Co.* v. *Conners Marine Co.*, 119 F. 2d 689, 690 (C. C. A. 2); *The Joseph O'Donnell*, 37 F. Supp. 120 (E. D. N. Y.).

[23] See pp. 35–37, *supra*.

CONCLUSION

It is respectfully submitted that the judgment below is erroneous and should be reversed, with directions to overrule the exceptions.

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NOVEMBER 1948.

APPENDIX A

1. Section 4283 (a) of the Revised Statutes, as amended by the Act of June 5, 1936 (49 Stat. 1479, 46 U. S. C. 183 (a)), reads as follows:

> SEC. 4283 (a). The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

2. Section 4284 of the Revised Statutes (2d ed., p. 827, 46 U. S. C. 184) reads as follows:

> SEC. 4284. Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for

the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto.

3. Section 4285 of the Revised Statutes, as amended by the Act of June 5, 1936 (49 Stat. 1480, 46 U. S. C. 185), reads as follows:

> SEC. 4285. The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter, as amended, and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 4283, as amended, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 4283, as amended. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.

4. Section 4286 of the Revised Statutes (2d Ed., p. 827, 46 U. S. C. 186) reads as follows:

> SEC. 4286. The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his

own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this Title relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof.

* * * * *

APPENDIX B

The pertinent provisions of the International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Seagoing Vessels (League of Nations Treaty Section 2763, Vol. 120, p. 125; U. S. Treaty Information Bulletin No. 20, May 1934, p. 13; 27 Amer. Journal of International Law (Supp.), p. 7, provide:

> ARTICLE 1. The liability of the owner of a seagoing vessel is limited to an amount equal to the value of the vessel, the freight, and the accessories of the vessel, in respect of—
>
> 1. Compensation due to third parties by reason of damage caused, whether on land or on water, by the acts or faults of the master, crew, pilot, or any other person in the service of the vessel;
>
> * * * * * *
>
> Provided that, as regards the cases mentioned in Nos. 1, 2, 3, 4, and 5 the liability referred to in the preceding provisions shall not exceed an aggregate sum equal to 8 pounds sterling per ton of the vessel's tonnage.
>
> * * * * * *
>
> ART. 4. The freight referred to in Article 1, including passage money, is deemed, as respects vessels of every description, to be a lump sum fixed at all events at 10 per cent of the value of the vessel at the commencement of the voyage.
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U. S. GOVERNMENT PRINTING OFFICE 1948